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No. 772

In the

Supreme Court of the United States

October Term 1966

THOMAS F. CARTER AND CARTER ELECTRONICS CORPORATION,
Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
SOUTHWESTERN BELL TELEPHONE COMPANY AND
GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petitioners Thomas F. Carter and Carter Electronics Corporation pray that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals (set out Appendix A, *infra*) is reported at 365 F. 2d 486.

JURISDICTION

The judgment of the United States Court of Appeals was entered on August 17, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Should the doctrine of primary jurisdiction be invoked in an antitrust suit where agency determination would not be decisive of any relevant issue in the antitrust proceeding?

2. (Conditionally Presented) In an antitrust suit is the primary jurisdiction referral order appealable under the collateral order doctrine?

STATEMENT

The present suit was brought by Petitioners Thomas F. Carter and Carter Electronics Corporation against Respondents American Telephone and Telegraph Company, Southwestern Bell Telephone Company, and General Telephone Company of the Southwest to recover damages for, and to secure preliminary and permanent injunctions against continuations of, violations of the Sherman and Clayton Antitrust Acts. (15 U.S.C. § 1, 2 and 14).

The complaint alleges that Petitioners have developed and manufactured a successful electronic device, known as the Carterfone, which provides a source of competition with the Respondents' mobile radio-telephone communications system. It alleges that there is a substantial market for communications systems of this type, and that the Peti-

tioners' product was able to compete successfully in the open market, but that the Respondents, using their monopoly power over telephone communications, have prevented the Petitioners from competing by threatening to discontinue the telephone service of any telephone subscriber who uses Petitioners' product. The complaint specifically alleges that the Respondents have combined and conspired between themselves and with other telephone companies to prevent Petitioners from manufacturing, distributing and selling the Carterfone; that the Respondents have, on a concerted basis, refused to permit subscribers to deal with Petitioners; that conduct of the Respondents was deliberately taken with the intent to restrain trade; that Respondents, acting together and with other telephone companies, have attempted to monopolize and have monopolized a significant line of commerce; and that these actions constitute violations of the antitrust laws of the United States for which Petitioners are entitled to damages. (R. 77-91).

Simultaneously with the filing of their complaint, the Petitioners filed a Motion for Preliminary Injunction, praying that the trial court enjoin the Respondents from a continuance of the antitrust violations. (R. 92-99).

Each of the Respondents filed a Motion to Dismiss, asserting (a) that the Court had no jurisdiction over the subject matter of the action, as exclusive primary jurisdiction was vested in the Federal Communications Commission, and (b) that the complaint failed to state a claim upon which relief could be granted. (R. 99-100; 145-146). Respondents have not filed an answer to the complaint and no

facts or testimony have been presented to or heard by the Trial Court. The allegations of the complaint are thus taken as true.

Respondents sought, by invoking a tariff they wrote and filed with the Federal Communications Commission, to "justify" the illegal conduct set forth in the complaint. The essence of Respondents' position is that all actions taken by them were required and justified by their tariff. The Petitioners contended, regardless of the applicability of the tariff to the conduct in question and regardless of the tariff's administrative validity, that the tariff could not confer any immunity from the violations of the antitrust laws alleged.

On February 8, 1966, the Trial Court entered an order overruling the Respondents' Motion to Dismiss, but holding all further action on the case in abeyance pending the conclusion of "appropriate administrative proceedings" before the Federal Communications Commission. (R. 148-156). Petitioners filed a Petition for Rehearing, requesting that this portion of the Court's order be rescinded, or in the alternative be clarified (R. 157-161), and a motion requesting that their application for a preliminary injunction be set for a hearing. (R. 161-162). Both the motion for hearing on the preliminary injunction and the petition for rehearing were summarily denied. (R. 162-163). Petitioners gave notices of appeal (R. 167-169) with reference to both the order denying the preliminary injunction and the order of February 8, 1966. Petitioners also filed a motion for writ of mandamus with reference to the order of February 8. The Court of Appeals held that it had jurisdiction under 28 U.S.C. § 1292(a) (1)

and accordingly dismissed the appeal taken under the collateral order doctrine and the petition for mandamus (all proceedings involved the single issue of primary jurisdiction).

In the event this Court should feel that the preliminary injunction appeal does not lie or does not permit full review, then Petitioners urge under the Second Question (conditionally presented) that the trial court Order of February 8, is appealable under 28 U.S.C. § 1291.*

Although the Court of Appeals did not directly question the well-established rule that FCC approval of a telephone company's tariff would not grant an immunity from the antitrust laws, the court held that the presence of the tariff required referral under primary jurisdiction and accordingly affirmed. (Appendix A, *infra*).

Subsequent to the ruling by the Court of Appeals, the FCC entered an order accepting referral and setting forth the issues for agency determination. (Set out Appendix B, *infra*.)

REASONS FOR GRANTING THE WRIT

I. *Decision Below Presents Significant Questions Concerning Application Of Primary Jurisdiction To Antitrust Proceedings Which Should Be Resolved By This Court.*

* Such a collateral order is appealable because, in the language of Justice Jackson in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), at 546-547, the Order does "not make any step toward final disposition of the merits of the case and will not be merged in final judgment"; if review is postponed until the time of final judgment, then "it will be too late effectively to review the present order and the rights conferred * * * will have been lost, probably irreparably"; and the order "is a final disposition of the claimed right which is not an ingredient of the cause of action and does not require consideration with it." See also *6 Moore's Federal Practice* ¶54.14.

Petitioners submit agency referral should be limited to cases where it would resolve decisive issues in the antitrust proceeding. To generally invoke primary jurisdiction in cases involving regulated industries would cripple the vital policy of the antitrust laws.

To establish in the case at bar that FCC determination will not govern the critical antitrust issues, it is first necessary to examine those issues. Petitioners' unchallenged allegations (and affidavit) assert, among other matters, that the Respondent telephone companies in combination have threatened to cut off the telephone service of all telephone subscribers who use the Carterfone—a competing product with the Respondents mobil radio-telephone system. Under the holdings by this Court in *Radiant Burners, Inc. v. Peoples Gas, Light and Coke Co.*, 364 U.S. 656 (1961), *Klors, Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959), and others,* Respondents' conduct constitutes a *per se* violation. Since primary jurisdiction could be invoked properly in both *per se* and non-*per se* cases, the importance in the case at bar of the conduct being a *per se* violation is that this isolates in sharp focus the critical antitrust issues. The rule in regard to the *per se* issue of "reasonableness" is summarized in the *United States Attorney General's Report on the Antitrust Laws*, (1955) at p. 12, as follows:

> "Certain arrangements which Section 1 proscribes are * * * by reason of their nature or necessary effect, 'conclusively presumed' unreasonably to restrain com-

* See also *Eastern States Retail Lumber Dealers Association, et al. v. United States*, 234 U.S. 600 (1914); *Associated Press v. United States*, 326 U.S. 1 (1945); *Fashion Originator's Guild v. Federal Trade Commission*, 114 F. 2d 80, *aff'd*, 312 U.S. 457. (1941).

> petition (the so-called unreasonable *per se* offenses). The most important of these involve fixing prices or limiting production. *Where such restraints are established, in purpose or in effect, inquiry under the Rule of Reason ends.*" (emphasis added).

Thus in the present case there should be no *factual* inquiry as to reasonableness of the Respondents' conduct. Yet the trial court in invoking primary jurisdiction stated it was doing so in order to "charge a jury on the basis of the FCC determination of reasonableness." (R. 71, see also R. 66-67). Although on appeal the Fifth Circuit recognized the *per se* nature of the antitrust violation and apparently discredited the trial court's position (see 365 F. 2d 486 at 497, n. 20), it upheld referral because the Respondents purportedly acted pursuant to an equipment tariff which Respondents had written and filed with the FCC. It should be noted that a charge to the jury on the FCC findings would be erroneous whether the case is *per se* or not. An FCC finding of tariff reasonableness cannot lawfully be translated by the trial court into reasonableness of anti-competitive *conduct*. Antitrust fact conclusions cannot be delegated to, or decided by, the FCC.

As noted in the opinion below (365 F. 2d 486 at 490), Petitioners anticipated that the Respondents' defense would center upon their tariff. In the present case administrative determination of the validity of the tariff would be relevant only if such a determination would confer *immunity* from the antitrust laws. The court below colorfully rejected Petitioners' position that the administrative validity of the tariff would be immaterial to the antitrust case:

> "It is here that their [Petitioners'] position becomes an enigma wrapped in a mystery. After formally denying

> validity or inapplicability of Tariff No. 132 in Par. XI (note 5, *supra*), in a number of ways and at endless times throughout the briefs to us they assert that they 'have not attacked the reasonableness or validity' of the tariff 'as a regulatory measure,' and they 'are quite content to assume, for the purposes of this appeal, that the tariff is valid under agency standards but' they add, 'not under antitrust standards.' Struggling as we do to divine their theory * * *." 365 F. 2d at 492.

For the reasons that follow Petitioners submit that FCC approval of the tariff would not grant an immunity from the antitrust violations and that the action of the court below in invoking primary jurisdiction is contrary to the rationale of decisions by this Court.

It is quite clear that the Communications Act does not confer any immunity, or provide for any exemption, applicable to the facts of the case at bar. There is no express exemption or immunity provided for in 47 U.S.C. Sections 201, 202, or 203. The only section of the Communications Act which purports to confer any exemption, 47 U.S.C. Section 222, has reference to consolidations and mergers specifically approved by the FCC.

The Supreme Court has already considered this precise question and has determined that the Communications Act does not confer any exemption from the antitrust laws. In *United States v. RCA*, 358 U.S. 334 (1959) this Court reviewed the legislative history of the Act and concluded:

> "While this history compels the conclusion that the FCC was not intended to have any authority to pass on anti-trust violations as such, it is equally clear that

> Courts retained jurisdiction to pass on alleged antitrust violations irrespective of Commission action." 358 U.S. at 343, 344.

At a later point in the opinion this Court noted:

> "It [the Congress] apparently considered that inherent in the scheme of the Act was the right to challenge under the anti-trust laws even transactions *approved* by the Commission * * *" 358 U.S. at 345 (emphasis added).

After further discussing additional legislative history this Court reiterated:

> "Thus, the legislative history of the Act reveals that the Commission was *not* given the power to decide antitrust issues as such, and that Commission action was not intended to prevent enforcement of the antitrust laws in federal courts." 358 U.S. at 346.

An even stronger holding on primary jurisdiction and immunity is contained in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963). There a bank merger was approved by the Comptroller of the Currency, in accordance with the directory provisions of the Bank Merger Act. This Court, while noting that banking is a pervasively regulated industry, and that the merger had received the approval of the appropriate administrative body, nevertheless held that the merger was prohibited by Section 7 of the Clayton Act. The banks contended that the prior administrative *approval*, under a statute which expressly required the consideration of competitive factors as a part of the administrative process (*un*like the Communications Act),

immunized the merger. Such position was repudiated by this Court, which held:

> "Appellees contended below that the Bank Merger Act, by directing the banking agencies to consider competitive factors before approving mergers, . . . immunizes approved mergers from challenge under the federal anti-trust laws. We think the District Court was correct in rejecting this contention. No express immunity is conferred by the Act. Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the anti-trust and regulatory provisions. . . ." 374 U.S. at 350, 351.

With specific reference to the doctrine of primary jurisdiction, this Court ruled:

> "We note, finally, that the doctrine of 'primary jurisdiction' is not applicable here. That doctrine requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme . . . .
>
> * * * * *
>
> " . . . Furthermore, the considerations that militate against finding a repeal of the anti-trust laws by implication from the existence of a regulatory scheme *also argue persuasively against attenuating, by postponing, the courts' jurisdiction to enforce those laws.*" 374 U.S. at 353, 354 (emphasis added).

The last comment of this Court is particularly appropriate to this case. Petitioners' rights to a recovery upon the violations they have alleged will, to say the least, be "attenuated" by requiring a lengthy and expensive proceeding before the FCC prior to obtaining a determination by the courts, particularly when no purpose will be served.

Respondents are engaged in business subject to regulation by the FCC, and they are required to give public notice of the regulatory practices they intend to follow. Since all of their practices and policies are subject to the publication requirement, for a court to hold that the Respondents are immune from liability from conduct performed in accordance with their published policies (tariffs) would be a blanket grant of immunity from the federal antitrust laws. The regulatory tariffs are drafted and published by the Respondents themselves and automatically become effective thirty days after publication. In *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) this Court held that, absent an express repealer of the antitrust laws, the taking of action authorized by a regulatory rule did not of itself confer any antitrust immunity.

In *California v. Federal Power Commission*, 369 U.S. 482 (1962) an application was pending before the Federal Power Commission for approval of a merger as required under provisions of the Natural Gas Act. The Government sued in federal district court to enjoin the merger on antitrust grounds. This Court held that under such circumstances, *the Commission's administrative findings should await the decision of the Courts.* The primary jurisdiction position advocated by the Respondents and adopted by the court below is the precise reverse of this Court's holding. Yet this Court's policy is most likely to produce a speedy and proper determination of the issues between the parties. Where the

agency action will not resolve the antitrust questions involved, the federal courts should exercise their jurisdiction without attempting to delegate their antitrust responsibilities to an agency which has no such jurisdiction.

Previously, this Court had held in a *per se* conspiracy to restrain trade that the *Courts (not administrative agencies) have jurisdiction to determine the matter*, even though the subject matter of the conspiracy was an agreement to fix rates, and the rates so fixed were within the special province of the appropriate administrative tribunal. *Georgia v. Pennsylvania Ry. Co.*, 324 U.S. 439 (1945).

Contrary to the principles of the above Supreme Court cases, the opinion below directed referral even though no immunity would result and no material issue would be decided:

> "In affirming this primary jurisdiction reference to the FCC, we must sound to all hands this caveat. In analyzing the contentions pro and con in the quest for seeking and identifying critical issues for initial administrative determination, nothing we have said or left unsaid, nothing expressed or implied, is to be considered as even a remote possible whisper of a suggestion as to how any one or more or all of the issues now disclosed or hereafter revealed are ultimately to be decided. All of those decisions are to be made first by the trial Judge when and after the primary jurisdiction reference has been concluded." 365 F. 2d at 499-500.

Yet, earlier in its opinion the Court below reluctantly conceded that in the "weird antitrust world" it might be

possible for the tariff to be valid for agency purposes but not for antitrust purposes (365 F. 2d at 495), but then went on to state several pages later:

> "There is, thus, the strong possibility that all, or a principal part, of the antitrust suit will effectually be determined by the resolution by the FCC of the validity and application of the tariff to Carterphone . . . . If it [the tariff] is legal, . . . then surely a significant issue having important, if not decisive, impact on the outcome of the antitrust litigation has been exercised." 365 F. 2d at 497 (these statements by the court were made after the court had characterized Petitioners' position as "an enigma wrapped in a mystery." 365 F. 2d at 492).

Because no immunity would result, the issues framed by the FCC for determination (Appendix B, *infra*) would not be dispositive of any critical issues to the present antitrust action, *viz.* an adverse agency determination would not preclude Petitioners' right to recover damages. *Respondents have yet to identify an administrative finding that would be decisive of any relevant antitrust issue.* Petitioners, however, neither object to the FCC proceedings nor question the administrative propriety of the hearing, for that hearing is separate from and independent of the antitrust suit below.

The court below appears to have adopted the following view of Davis:

> " . . . 'even if the court thinks that the arrangement alleged to violate the anti-trust laws cannot be legally approved by the agency . . . 'the court should still allow the agency first to pass upon the question.' 3 Davis Administrative Law §19.07, at 40 (1958)." 365 F. 2d at 499.

With deference, Petitioners submit the correct rule is well summarized by McGovern:

> "Nor is there any scope for the operation of the [primary jurisdiction] doctrine where the agency's views on a given issue may have only academic interest for a court. The purpose of the doctrine is not to give litigants a sleighride. If the agency determination of the issue is *not relevant to the disposition* of the matter in Court, no justification exists for a reference * * * *
>
> * * * * *
>
> The purpose of the doctrine of primary jurisdiction in this field [antitrust] is not merely to place a premium upon pleading skills but rather to evaluate whether the *critical issues* posed in the antitrust case actually fall within the policymaking competence of the regulatory agency." *Types of Questions Over Which Administrative Agencies Do Not Have Primary Jurisdiction*, 13 ABA, Section of Antitrust Law 57, at 66, 67 (1958). (emphasis added).

The overwhelming power of some industries is the reason why they are regulated and why they must give public notice of their business policies through the publishing of tariffs. The tariff requirement is not to erect a shield from antitrust laws but to subject the practices of regulated industries to challenge on other grounds. Because of their power, and the difficulties of entry, the regulated industries can crush competition at the outset and extend with ease their monopoly. If the victims of such antitrust violations must first pursue administrative relief, there will be no reasonable possibility for the emergence of a new and competitive company. *E.g.* in *Hush-A-Phone, Corp. v. United*

States and AT&T, 238 F. 2d 266 (D.C. Cir. 1956) where the plaintiff sought agency relief instead of antitrust relief, the administrative hearing alone lasted some seven years—1948 to 1955. (The question there was very simple—could a plastic cup-like device be placed on the telephone handset?) While it is expected and hoped that the present FCC proceeding will be resolved in less than seven years, Petitioners should not be put out of business until an agency determination is made which will not control the antitrust proceeding. Until Congress states to the contrary, the public policy in favor of the enforcement of the antitrust laws should govern.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be Granted.

Respectfully submitted,

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APPENDICES

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Appendix A

Opinion and Judgment of Court Below, Carter et al. v. AT&T et al., 365 F. 2d 486 (5th Cir. 1966) ..... A-1—A-27

Appendix B

Order of Federal Communications Commission, Docket No. 16942, In the Matter of Use of Carterphone Device in Message Toll Telephone Service ..... B-1—B-4

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APPENDIX A

In the

United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 23,556

THOMAS F. CARTER and CARTER ELECTRONICS CORPORATION,
Appellants,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, et al.,
Appellees.

Appeals from the United States District Court for the Northern District of Texas.

No. 23,557

THOMAS F. CARTER and CARTER ELECTRONICS CORPORATION,
Appellants,

v.

HONORABLE JOE E. ESTES, Chief Judge, United States District Court, Northern District of Texas, et al.,
Appellees.

On Petition for Writ of Mandamus to the United States District Court for the Northern District of Texas

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(August 17, 1966.)

Before BROWN and COLEMAN, Circuit Judges, and DAWKINS, District Judge.

BROWN, Circuit Judge: At issue here is whether a District Court in a private antitrust action for triple damages and injunctive relief should invoke the doctrine of primary jurisdiction to refer a question of tariff validity to the regulatory agency. It comes to us from a denial of a preliminary injunction. We agree with the District Court's primary jurisdiction reference to the Federal Communications Commission and affirm.

I.

At the outset we conclude that we have jurisdiction of the appeal under 28 USCA §1292(a)(1) as a denial of a preliminary injunction and the Telephone Company's motion to dismiss the appeal must accordingly be denied.

We need only briefly sketch the chronology. The complaint, filed November 29, 1965, was accompanied by a separate formal motion for preliminary injunction. The plaintiffs-appellants requested an early setting which would include the application for preliminary injunction. Thereafter by an exchange of letters among counsel and the Court and an informal pretrial conference in mid-December, the Judge extended the time for the defendants' responsive motions

or answers to January 14, 1966. The defendants filed a motion to dismiss on the dual ground (a) asserting primary jurisdiction in the FCC and (b) failure to state a claim. The Court subsequently fixed a hearing for February 7, 1966, and by the Court's direction, this hearing was to be (and was) confined to the motions to dismiss. At the conclusion of the extended hearing February 7, the Judge announced orally his decision denying the motion to dismiss for failure to state a claim, but holding the case in abeyance until determination of the tariff's validity by the FCC. This was followed February 8 by a formal written memorandum order. Subsequently on February 16, the plaintiffs-appellants filed separate motions for rehearing and for a hearing on the motion for preliminary injunction. On February 24, each motion was denied.[1]

Thus there is no doubt that both by the initial prayer in the complaint and by formal motion, the plaintiffs-appellants sought a preliminary injunction. Equally uncontradicted is the fact that such injunction was not granted. But, appellees argue, it is not that simple. On their theory, the Court having on February 8 put the case in abeyance pending reference to the FCC, the application for preliminary injunction was but a part of the case thus deferred, for the Court did not deny the preliminary injunction, only the hearing thereon. Consequently, the argument runs, the formal

[1] The order as to preliminary injunction stated:

> "Having duly considered Plaintiffs' Motion for Hearing on Preliminary Injunction filed herein on February 16, 1966, the Court is of the opinion that for the reasons stated in its Memorandum Order entered herein on February 8, 1966, such Motion should be and is hereby DENIED."

motion for a preliminary injunction was but a paper means of casting the primary jurisdiction reference ruling into an appealable form and not, as it really was, a mere stay order. This rests, in turn, on the generally accepted proposition that orders merely staying further action pending some event are not generally appealable.[2]

On this reading, the Judge was simply declining to entertain any requests until after the reference. But we read it differently. In the colloquy at the end of the February 7 hearing the Judge made it plain that the plaintiffs could file and he would consider all motions desired. The Judge did not treat the reference order as a ground merely for not *considering* the request for preliminary injunction. Rather, he treated the reference order as the *reason* why the injunction should be denied. It is, of course, the denial of a preliminary injunction, not the validity of the reasons therefor, which triggers the interlocutory appeal as a matter of right under §1292(a)(1). Our conclusion is not in any sense at odds with *Allied Air Freight, Inc. v. Pan American World Airways*, 2 Cir., 1965, 340 F. 2d 160, cert. denied, 381 U.S. 942, ... S. Ct. ....., 14 L. Ed. 2d 683, or *American Airlines, Inc. v. Forman*, 3 Cir., 1953, 204 F. 2d 230, cert. denied, 346 U.S. 806, 74 S. Ct. 54, 98 L. Ed. 336. In *Allied Air Freight* the unsuccessful plaintiffs in a triple damage action (not injunc-

[2] Republic of China v. National City Bank, 2 Cir., 1952, 194 F. 2d 170; Brande v. S & S Mach. Co., 2 Cir., 1958, 252 F. 2d 297; International Nickel Co. v. Martin J. Barry, Inc., 4 Cir., 1953, 204 F. 2d 583; United Gas Pipeline Co. v. Tyler Gas Serv. Co., 5 Cir., 1957, 247 F. 2d 681, cert. denied, 355 U.S. 895, 78 S. Ct. 263, 2 L. Ed. 2d 193; Jackson Brewing Co. v. Clarke, 5 Cir., 1962, 303 F. 2d 844, cert. denied, 371 U.S. 891, 83 S. Ct. 190, 9 L. Ed. 2d 124; United States v. Richardson, 5 Cir., 1953, 204 F. 2d 552; 6 Moore, Federal Practice, §54.07.

tion) sought to make the stay a vicarious granting of a preliminary injunction. On familiar principles, see note 2, *supra*, this would not work. In *American Airlines* the defendant sought to appeal from a denial of its motion to dismiss on the ground that primary jurisdiction was in the CAB. Not unexpectedly the Court of Appeals found no appealable order and also denied relief by mandamus.

The serious question of primary jurisdiction reference is therefore properly before us.[3]

II.

In analyzing the plaintiffs' complaint, it is well to bear in mind their blunt, bold position. The appellants claim that the trial Court by applying the doctrine of primary jurisdiction has effectively precluded them from obtaining the antitrust relief which they seek. Further, it is their position that the doctrine of primary jurisdiction does not apply because administrative agency approval does not immunize the Telephone Company's conduct from the operation of the antitrust laws, especially where the violation of those laws is claimed to be *per se* since an administrative determination

[3] The companion case for mandamus (No. 23,557) is dismissed as is the effort to appeal the February 8 stay order after denial of certification by the trial Court under 28 USCA §1292(b). With the flexibility given §1292(b) by this Circuit, unlike some others, Hadjipateras v. Pacifica S.A., 5 Cir., 1961, 290 F. 2d 697, 1961 AMC 1417, Agricultural Trans. Ass'n. v. King, 5 Cir., 1965, 349 F. 2d 873; Ex parte Tokyo Marine & Fire Ins. Co., Ltd., 5 Cir., 1963, 322 F. 2d 113, the interlocutory certification method has many attractions in primary jurisdiction reference situations. Since the Court of Appeals must affirmatively allow a 1292(b) appeal, it affords a very early look-see as to whether in the given situation the primary reference order will ultimately be sustained in all likelihood.

of reasonableness would be irrelevant, and because there are no issues relevant to a disposition of the case at bar which require administrative expertise for their determination.

The complaint sought triple damages and injunctive relief under the antitrust laws. 15 USCA §§15, 22. Only two defendants were named and served, A.T.&T. and General.[4] These two along with 26 other named, but nonparty, telephone companies, 19 of which are owned and controlled by A.T.&T. were alleged to have jointly and severally conspired as a part of a common design to prevent the plaintiffs from marketing and distributing their Carterphone device.

The Carterphone, developed by the individual plaintiff Carter and manufactured and distributed by the corporate plaintiff, Carter Electronics, is a device for use with the traditional telephone handset. When in use, the telephone receiver handset is placed on a cradle which forms part of the Carter-phone unit and by the process of induction, without any electrical connection or wiring or physical attachment, the Carterphone unit activates a two-way radio communication system to permit the telephone caller to converse with another person who may be located miles away from the telephone receiver handset. Similarly, the device works in the opposite direction to permit further transmission by landlines of voice signals originating by mobile radio transmitter.

A substantial market throughout the United States has been developed competing in the product-relevant-market of the manufacture and sale of devices permitting private

[4] American Telephone and Telegraph Company, and the General Telephone Company of the Southwest.

subscribers from regulated telephone companies to transmit telephone calls to and from points beyond the handset. Despite this economic demand the defendant Telephone Companies acting in concert with one or more or all of the named nonparties have taken concerted action to monopolize interstate commerce. These Telephone Companies sell and lease mobile radio-telephone units to their subscribers throughout the United States. These mobile units perform a function essentially similar to that afforded by the Carterphone and thus both are directly competitive. In violation of the antitrust laws, the Telephone Companies are undertaking to exclude the plaintiffs and other similar competitors from manufacturing or selling devices which would compete with Telephone Company-furnished mobile units.

To bring this about the Telephone Companies as sellers and lessors have required private subscribers, as buyers and lessees, not to deal with the Carterphone unit. Such requirements, conditions and understandings constitute concerted action which have no reasonable purpose but which do have a damaging effect on competition. The Telephone Companies with the specific intent to restrain trade and commerce have deliberately and purposefully issued instructions to their agents and those of the nonparty Telephone Companies to forbid the use of the Carterphone device by their private subscribed customers. Each of the Telephone Companies, due to its size and economic resources, has both the power to control the prices of competitive communication devices and the power to exclude competitors. The Telephone Companies in conspiracy and combination with each other as well as the named nonparty companies have exercised their eco-

nomic power within the relevant market to require their customers to refrain from purchasing or using the Carterphone.

At this point in the complaint, the plaintiffs, wisely we think, anticipated the matter of regulatory tariffs. They expressly allege in Paragraph XI that the Telephone Companies "in order to accomplish the violation of the federal antitrust laws heretofore set forth, have published a regulatory tariff which purports to prevent the use of a device similar to the Carterphone * * *. Such tariffs are similar or identical to * * * AT&T tariff FCC No. 132," a copy of which was annexed to the complaint "and incorporated herein."[5]

[5] Tariff FCC No. 132:

"MESSAGE TOLL TELEPHONE SERVICE

"B. GENERAL REGULATIONS (Cont'd)

"7. *Unauthorized Attachments or Connections*

"No equipment, apparatus, circuit or device not furnished by the Telephone Company shall be attached to or connected with the facilities furnished by the Telephone Company, whether physically, by induction or otherwise, except as provided in this Tariff. In case any such unauthorized attachment or connection is made, the Telephone Company shall have the right to remove or disconnect the same; or to suspend the service during the continuance of said attachment or connection; or to terminate the service."

Though the tariff was amended in response to the Commission's order in Hush-A-Phone Corp. v. American Tel. & Tel. Co., No. 9189, FTC, Feb. 6, 1957, following the decision in Hush-A-Phone v. United States, D. C. Cir., 1956, 238 F. 2d 266, to permit the attachment of devices similar to the Hush-A-Phone for the convenience of the user, the prohibition on non-furnished equipment such as the Carterphone was carried forward in the concluding paragraph of Section B. 24:

"Except as otherwise provided in this tariff, nothing herein shall be construed to permit the use of a recording device, or of a device to interconnect any line or channel of the Telephone Company with any other communications line or channel of the Company or of any other person."

See FCC Public Notice No. 57-518, May 15, 1957.

(footnote continued on following page)

The plaintiffs then go on to allege that "although the Plaintiffs deny that such tariff is a valid tariff and that such tariff is applicable to the Carterphone, regardless of its validity and its application," the Telephone Companies "have, as a part of a common design and scheme, in uniformly publishing and enforcing such tariff, wrongfully used such tariff to accomplish a violation of the antitrust laws of the United States. Such tariff does not and may not authorize or excuse the aforementioned violation of the antitrust laws * * *."

Then followed a brief description of the damage suffered because a large number of orders for Carterphones had been cancelled by customers and dealers due to the conduct of the Telephone Companies. The formal prayer for injunctive relief, broad and sweeping in its terms, would forbid enforcement or application of Tariff No. 132.[6]

(footnote continued from preceding page)

It rounds out the tariffese that the interconnection privileges "otherwise provided in this tariff" (§B.24, supra) do not purport to touch the Carterphone or similar devices. Tariff FCC No. 132 sections which allow interconnections under certain conditions are as follows: §B.25 (connections with facilities of power, pipe line, and railroad companies pursuant to Tariff FCC No. 134); §B.26 (connections with experimental satellite facilities through connecting equipment provided by the telephone company); §B.247 (connection with N.A.S.A. installations pursuant to Tariff FCC No. 134); §B.28 (connections with certain facilities of the U.S. Army, Navy, and Air Force provided the appropriate Secretary of such Department certifies that connection is required by reasons of military necessity); §J (service through miscellaneouos common carriers utilizing telephone company intraexchange equipment).

[6] The prayer was for a permanent order "enjoining the defendants * * * from interfering with, harassing or preventing the sale and distribution of the Carterphone * * *" and "from threatening or intimidating any customer or prospective customer * * * with the curtailment * * * or removal of such customers' telephone service and from "directly or indirectly suggesting or advising the customers, prospective customers, and users of the Carterphone device that the use of such device may subject said persons * * * to any loss of * * * the telephone service provided by * * * [the telephone companies] * * *."

On the basis of the complaint, tariffs, regulations, and agency orders of which it could take judicial knowledge,[7] the District Court held that "primary jurisdiction" is "vested in the" FCC "to resolve all questions relating to the justness, reasonableness, validity, and effect of the tariff and practices complained of." The Court accordingly stayed further proceedings but recognized "that jurisdiction remains in the Court to pass ultimately upon the antitrust issues."

III.

No matter from what vantage viewed, the conclusion is unerringly indicated that this was a case permitting, indeed requiring, primary jurisdiction reference to the FCC.

Our principal difficulty in the case comes from the fact, made quite clear in the probing from the bench, that we simply do not understand the theories the plaintiffs so earnestly press. We can accept their insistence that the Telephone Companies read the complaint too narrowly in their argumentative effort to confine its total claim to Par. XI, see text accompanying note 5, *supra*, which affirmatively brings in and challenges AT&T Tariff FCC No. 132, note 5, *supra*. But both from the formal allegations of the complaint, and more so from a broader consideration of the very

[7] Interstate Natural Gas Co. v. Souothern Cal. Gas Co., 9 Cir., 1953, 209 F. 2d 380; Fletcher v. Jones D.C. Cir., 1939, 105 F. 2d 58, cert. denied, 308 U.S. 555, 60 S. Ct. 116, 84 L.Ed. 467; Greeson v. Imperial Irr. Dist., 9 Cir., 1932, 59 F. 2d 529.

nature of the case,[8] the tariff is inescapably at the center of this controversy.

It is here that their position becomes an enigma wrapped in a mystery. After formally denying validity or inapplicability of Tariff No. 132 in Par. XI (note 5, *supra*), in a number of ways and at endless times throughout the briefs to us they assert that they "have not attacked the reasonableness or validity" of the tariff "as a regulatory measure," and they "are quite content to assume, for the purposes of this appeal, that the tariff is valid under agency standards, but" they add, "not under antitrust standards."[9] Struggling as we do to divine their theory, we see two possibilities. The first is their repeated insistence that, as pleaded, this is a case of a concerted refusal to deal, and as such is a classic *per se* violation of the antitrust laws. The second, perhaps, is that this is an instance of the Arnall attack on the primary monopolistic purpose of an industry-wide adoption of

[8] The primary jurisdiction problem is not to be approached with any narrow, technical pleading point of view. As is well stated by McGovern, *Types of Questions Over Which Administrative Agencies Do Not Have Primary Jurisdiction*, 13 ABA, Antitrust Section 57, 66-67 (1958):

> "The doctrine of primary jurisdiction was not conceived as a shield to relieve regulated industries from all responsibility under the antitrust laws for their unlawful conduct. But neither does the addition of the epithet 'conspiracy' to an agreement for concerted activity approved by an agency automatically convert an otherwise lawful agreement into an unlawful contract and combination under the antitrust laws. The purpose of the doctrine of primary jurisdiction in this field is not merely to place a premium upon pleading skills but rather to evaluate whether the critical issues posed in the antitrust case actually fall within the policymaking competence of the regulartory agency."

Indeed, what was denominated a motion to dismiss because primary jurisdiction was in the FCC was, in effect, transmuted by the Court into a motion to require, and a stay pending, reference to the FCC. See 3 Davis, Administrative Law §19.07, at 42-44 (1958 ed.).

[9] Appellants' Brief, p. 31.

a restrictive tariff. *Georgia v. Pennsylvania R.R.*, 1945, 324 U.S. 439, 65 S. Ct. 716, 89 L. Ed. 1051. But neither of these, alone or together, rule out the tariff as a critical issue.

As to the first, the theory is really question-begging, for while concerted refusal to deal is a *per se* violation,[10] the extent and nature of the regulation of a regulated industry may make such concerted action legal.[11] *Keogh v. Chicago*

[10] Appellants vigorously press: Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co., 1961, 364 U.S. 656, 81 S. Ct. 365, 5 L.Ed. 2d 358; Klors, Inc. v. Broadway Hale Stores, 1959, 359 U.S. 207, 79 S. Ct. 705, 3 L.Ed. 2d 741; Eastern States Retail Lumber Dealers Ass'n v. United States, 1914, 234 U.S. 600, 34 S. Ct. 951, 58 L.Ed. 1490; Associated Press v. United States, 1945, 326 U.S. 1, 65 S. Ct. 1416, 89 L.Ed. 2013; Fashion Originators Guild of America v. FTC, 1941, 312 U.S. 457, 61 S. Ct. 703, 85 L.Ed. 949, affirming 2d Cir. 1940.

[11] In Silver v. New York Stock Exchange, 1963, 373 U.S. 341, 83 S. Ct. 1246, 10 L.Ed. 2d 389, the Supreme Court made this clear beyond doubt. First, the Court recognized that under the cases relied on by appellants here, see note 10, supra,

> "It is plain, to begin with, that removal of the wires by collective action of the Exchange and its members would, had it occurred in a context free from other federal regulation, constitute a per se violation of §1 of the Sherman Act."

373 U.S. at 347, 83 S. Ct. at . . ., 10 L.Ed. 2d at 394, but the Court went on to state that "in this case, however, the presence of another statutory scheme, that of the Securities Exchange Act of 1934, means that such a conclusion is only the beginning, not the end, of inquiry," 373 U.S. at 349, 83 S. Ct. at . . ., 10 L.Ed. 2d at 395. Pinpointing the problem as being one of reconciling the aims of the antitrust laws with the policies of the Securities Exchange Act, after analyzing these policies the Court found no legislative intention to immunize completely the exchange's actions from the operation of the antitrust laws. See note 25, infra. But the Court made clear that the absence of total immunity does not automatically mean that actions in a regulated industry are to be judged by per se standards in applying the antitrust laws:

> "But, under the aegis of the rule of reason, traditional antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate of the Securities Exchange Act. * * * Although * * * the statutory scheme of that Act is not sufficiently pervasive to create a total exemption from the antitrust laws, * * * it is also true that particular instances of exchange self-regulation which fall within the scope and purposes of the Securities Exchange Act may be regarded as justified in answer to the assertion of an antitrust claim."

373 U.S. at 360-61, 83 S. Ct. at . . ., 10 L.Ed. 2d at 402.

& Northwestern Ry., 1922, 260 U.S. 156, 162, 43 S. Ct. 47, ..., 67 L. Ed. 183, 187. This contention in effect therefore anticipates the ultimate decision of the FCC[12] and later the Antitrust Court as to the validity and significance of the tariff.[13] The same is really true as to the second, since it is difficult to believe that the FCC, from the communica-

[12] When used throughout the expression FCC order, etc. refers to the first decision thereon after appropriate judicial review. There are two methods of obtaining judicial review of an FCC decision provided by the Communications Act, 47 USCA §402. For reference to this special statutory review provision and for supplementary methods of review, see §10(b) of the Administrative Procedure Act, 5 USCA §1009(b). Under §402 the method of review depends on the kind of decision sought to have reviewed. Decisions granting, denying, modifying, and revoking designated permits and licenses, and §312 cease and desist orders are reviewable exclusively by the Court of Appeals for the District of Columbia. 47 USCA §402(b). Proceedings seeking to enjoin, set aside, annul, or suspend any other orders of the FCC must be brought pursuant to the Administrative Orders Review Act of 1950 (Hobbs Act), 5 USCA §1031 et seq., 47 USCA §402(a), in the circuit where the petitioner resides or has its principal office or in the District of Columbia Circuit. 5 USCA §1033. See generally 3 Davis. Administrative Law §23.03, at 305. It thus appears that judicial review of the FCC's determination of the validity and applicability of Tariff No. 132 would follow this second method. See, e.g., Hush-A-Phone v. United States, supra. Therefore, it is possible that the review of the FCC's determination and the review of the Antitrust Court's subsequent decision may be by different Courts of Appeals. This is to be contrasted to the situation where a District Court refers a matter to the ICC under the primary jurisdiction doctrine. There the statute expressly provides that "the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend * * * any order * * * arising out of such referral." 28 USCA §1336; see Agricultural Transp. Ass'n v. King, 5 Cir., 1965, 349 F. 2d 873, 885 n. 35.

[13] See 3 Davis, Administrative Law §19.05, at 25:

> "* * * [T]he problem is not one of application of the antitrust laws but is one of accommodation of the antitrust policy to the regulatory policy. * * * The courts are obviously well equipped to make initial decisions involving application of the antitrust policy. But, before the particular regulatory agency has defined the particular regulatory policy in the particular case, the courts are not well equipped to make initial decisions involving accommodation of the antitrust policy to the regulatory policy."

tion-utility-point of view, could uphold as "just and reasonable," 47 USCA §201(b), 205, a tariff proved to have been brought into being by a concerted action whose aim was monopolistic, not the maintenance or improvement of telephone service.

The extravagant brandishing of antitrusts, the repetition of inflammatory epithets of combination, conspiracy, concerted action, monopolistic aim, the frequent incantation of the antitrust laws, and the fervent desire to keep the case for jury resolution in a Federal Court cannot either extinguish the Communications Act of 1934 or erase Tariff No. 132 as a significant, if not decisive, factor.

The starting point is the Communications Act of 1934, 47 USCA §151 et seq. The National communications policy is broadly stated "to make available * * * to all the people of the United States a rapid, efficient, nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges * * *," USCA §151. The execution of the statutory scheme is commented to the FCC. And this structure, with infinite detail, undertakes to subject communication utilities to refined and comprehensive regulation.

To achieve these goals, the Communications Act grants a broad range of powers to the Federal Communications Commission. 47 USCA §§201-222. The Commission has the power to require a telephone company to furnish "service upon reasonable request therefor," and, where the Commission "finds such action necessary or desirable in the public interest," to require interconnection with other carriers at

rates set by the Commission after opportunity for hearing. 47 USCA §201(a). "All charges, practices, classifications, and regulations" of telephone companies "shall be just and reasonable;" "unjust or unreasonable" charges are unlawful, 47 USCA §201(b). The Commission has the power to prescribe such rules and regulations as are "necessary in the public interest" to carry out the provisions of the Act. 47 USCA §201(b). To this end, the Commission has promulgated 493 pages of regulations governing the common carrier services provided by telephone companies. 47 C.F.R., Parts 20-69. It is unlawful for a telephone company to discriminate in any "unjust or unreasonable" manner in its "charges, practices, classifications, regulations, facilities, or services." 47 USCA §202(a). Each telephone company is required to file with the Commission, and keep open for public inspection, tariffs setting forth its charges, classifications, regulations, and practices. 47 USCA §203(a). Such traiffs must be followed until such time as they are amended in the manner provided by the statute. 47 USCA §203(b). A telephone company may not provide service unless tariffs are filed covering such service and the company may not deviate from the rates, classifications, regulations or practices containd in the tariffs so filed. 47 USCA §203(c).

The FCC has the power and duty to examine all tariffs filed and may either on complaint or on its own initiative determine and prescribe what charges, classifications, regulations, and practices are "just, fair, and reasonable" and are to be thereafter followed by the telephone company in ques-

tion. 47 USCA §205(a). The Commission is given extensive power to assess the value of the facilities of telephone companies. 47 USCA §213. The Commission has the power to order a telephone company to provide additional facilities for the performance of its duties as a public utility, if such addition is "in the interest of public convenience and necessity" or "the expense involved therein will not impair the ability of the carrier to perform its duty to the public." 47 USCA §214(d). However, a carrier does not have the right to extend its lines unless the Commission authorizes it to do so by the issuance of a certificate of public convenience and necessity. 47 USCA §214(a). The Commission has power to examine transactions entered into by any common carrier which may affect the carrier's charges or services. 47 USCA §215(a). The Commission has the specific duty to keep informed as to "technical developments and improvements in wire and radio communication * * * to the end that the benefit of new inventions and developments may be made available to the people of the United States." 47 USCA §218.

Against this intricate statutory structure in which scarcely a single business act is free from continuous regulation or at least administrative governmental review, one thing emerges clearly. It is that Tariff No. 132, its meaning, its scope, its applicability, its validity for any or all governmental purposes, is ever-present. The best illustration is to accept momentarily the concession[14] of appellants that the tariff is authoritatively held to be valid administratively for regula-

[14] Appellants do not make this as an *arguendo* assumption. On their thesis they accept it as valid for so-called "administrative" regulatory purposes.

tory purposes, to which they add, but not valid for antitrust purposes. We can recognize, of course, that in this sometime weird antitrust world, in which antitrust policies appear to have an overpowering influence in the running clash between supposedly coordinate executive agencies or departments of the same Government, *cf. California v. FPC*, 1962, 369 U.S. 482, 82 S. Ct. 901, 8 L. Ed. 2d 54, it is possible for the Courts to hold finally that this result could occur. But that choice ought not to be made, the occasion for facing such a possibility ought not to be forced until it is inescapably necessary. The very difficulties inherent in that prospect demonstrate that.

On any such hypothesis, of course, a significant thing will be the FCC determination of the validity of Tariff No. 132. If, as the law clearly permits,[15] the monopolistic and anti-

[15] Under statutory rate and practice standards of "just and reasonable," many technical and administrative factors are involved in the light of the industry being regulated. Some of the factors, many complex and highly technical, as we advance in the electronic age, concerning maintenance and upkeep of non-furnished equipment with resulting deterioration of high quality service for both incoming and outgoing calls, are illustrated in several cases. See, e.g., Peters Sunset Beach, Inc. v. Northwestern Bell Tel. Co., Minn. R.R. & Warehouse Comm'n, 1965, 60 P.U.R. 3d 363; City of Los Angeles v. Southern Cal. Tel. Co., Cal. R.R. Comm'n, 1933, 2 P.U.R. (NS) 247; In the Matter of AT&T & Western Union Tel. Co., F.C.C., 1948, Docket No. 8963. One of the factors, especially where, as here, the matter is precipitated by antitrust claims, is the propriety, if not the duty, of the administrative agency to consider monopolistic and antitrust implications. The Supreme Court has made this clear. In United States v. Radio Corp. of America, 1959, 358 U.S. 334, 348, 79 S. Ct. 457, ... 3 L.Ed. 2d 354, 364, the Court said:

> "Accordingly, this Court consistently held that when rates and practices relating thereto were challenged under the antitrust laws, the agencies had primary jurisdiction to consider the reasonableness of such rates and practices in the light of the many relevant factors including alleged anti-

(footnote continued on following page)

trust implications of the practices compelled by the tariff were among the factors considered and evaluated by the FCC, a Court would be hard put in either contriving or thereafter verbalizing a concept which, in a sort of now-you-see-it, now-you-don't sleight of hand, would allow the tariff to be valid and yet invalid at one and the same time.[16]

Despite the disparagement of plaintiffs that the tariff is initially the handwork of the Telephone Companies' scriveners and is, at any event, not a rate but a mere equipment tariff, two things are positive. First, a tariff, required by law to be filed, is not a mere contract. It is the law. *Compania*

(footnote continued from preceding page)

trust violations, for otherwise sporadic action by federal courts would disrupt an agency's delicate regulatory scheme, and would throw existing rate structures out of balance."

Even more pointed is the holding in McLean Trucking Co. v. United States, 1944, 321 U.S. 67, 80, 64 S. Ct. 370, ..., 88 L.Ed. 544, 553, where the Court held:

"But in executing those policies [of the transportation Act committed directly to the ICC] the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true, it cannot, without more, ignore the latter. The precise adjustments which it must make, however, will vary from instance to instance depending on the extent to which Congress indicates a desire to have those policies leavened or implemented in the enforcement of the various specific provisions of the legislation with which the Commission is primarily and directly concerned."

See also FCC v. RCA Communications, Inc., 1953, 346 U.S. 86, 73 S. Ct. 998, 97 L. Ed. 1470; City of Pittsburgh v. FPC, D.C. Cir., 1956, 237 F. 2d 741, 754.

[16] Cf. Pan American Airways v. United States, 1963, 371 U.S. 296, 309, 83 S. Ct. 476, ..., 9 L. Ed. 2d 325, 335:

"It would be strange, indeed, if a division of territories or an allocation of routes which met the requirements of the 'public interest' as defined in §2 were held to be antitrust violations. It would also be odd to conclude that an affiliation between a common carrier and an air carrier that passed muster under §408 should run afoul of the antitrust laws."

Anonima Venezolana De Navegacion v. A. J. Perez Export Co., 5 Cir., 1962, 303 F. 2d 692, 696 & n. 12, cert. denied, 371 U.S. 942, 83 S. Ct. 321, 9 L. Ed. 2d 276; *United States v. Associated Air Transp. Inc.*, 5 Cir., 1960, 275 F. 2d 827, 833. Second, the telephone utility is required to file in its schedules and tariffs "the classifications, practices, and regulations affecting such charges," 47 USCA §203(a). The "classifications, practices, and regulations," as well as the charges, must be "just and reasonable." 47 USCA §201(b). The Commission is empowered to determine whether they are and its power extends to determining "what classification, regulation, or practice is or will be just, fair, and reasonable." 47 USCA §205(a). The "* * * Commission's range of power over the regulated companies" extends to "* * * 'charges, practices * * * *" and "is not limited to rates and * * * services." *Ambassador, Inc. v. United States*, 1945, 325 U.S. 317, 323, 65 S. Ct. 1151, ..., 89 L. Ed. 1637, 1642. Considering that so long as the tariff is "administratively" valid and applicable—as is assumed—the Telephone Company not only may, but must, enforce it uniformly as to all similarly situated, to permit the Antitrust Court to declare it invalid would be putting judicial imprimatur on operational chaos. It would require in effect that the Telephone Company disconnect service to those using Carterphones but who do not sue, while continuing service to those who sue. Worse, ratepayers, including those coerced under the operative effect of the tariff to discontinue Carterphone, would bear their proportionate part of the amount of triple damages and attorneys' fees

paid out to the successful antitrust suing customer.[17] That chaos, of course, could be eliminated by the Antitrust Court holding that despite earlier FCC approval of the tariff, the monopolistic implications are so great that it cannot stand for any purpose. This, in effect, would be a first, second, or third tier re-review[18] of an already reviewed administrative decision.[19] The likelihood of this occurring is remote enough to say that the prospect ought not to be anticipated.

There is, thus, the strong possibility that all, or a principal part, of the antitrust suit will effectually be determined by the resolution by the FCC of the validity and application of the tariff to Carterphone. This is not to say, as the appellants' briefs contend, that contrary to *United States v. Radio Corp. of America, supra,* 358 U.S. at 343-46, 79 S. Ct. at ....., 3 L. Ed. 2d at 361-62; *California v. FPC, supra; United States v. Philadelphia Nat'l Bank, supra,* 374 U.S. at 350-54, 83 S. Ct. at ....., 10 L. Ed. 2d at 937-39; and *Silver v. New York Stock Exchange, supra,* the Communications Act of

[17] See generally von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction,* 67 Harv. L. Rev. 929 (1954), who concludes:

> "The doctrine of primary jurisdiction is essential to effective regulation. Without it members of regulated industries would be subject to the commands of two masters—the regulatory statute as administered by the agency and the antitrust laws as administered by the courts. * * * It is nothing* more than a procedural device to secure preliminary administrative determinations of regulatory matters."

Id. at 965-66

*We would add this caveat: "Nothing" is a very very positive word, perhaps too much so.

[18] First tier, the District Court trying the antitrust suit; second tier, the Court of Appeals reviewing that decision; third tier, the Supreme Court.

[19] See note 12, supra.

1934 either confers immunity on telephone companies or commits to the FCC the determination of antitrust issues as such. What we do say is that inescapably presented is the question whether the practice permitted, indeed required, by Tariff No. 132 is lawful. If it is legal, and if it must be applied to all alike, then surely a significant issue having important, if not decisive, impact on the outcome of the antitrust litigation has been exercised.

That this is a role of primary jurisdiction reference is demonstrated by assuming the success of the present appeal, our reversal of the stay pending reference and the immediate trial of the antitrust suit. By-passing the difficult problems of what treatment, if any, the trial Judge would give to Tariff 132 either in the admission of evidence or jury instructions,[20] how would the validity and application of the tariff ever be effectively determined by the FCC with respect to this particular antitrust case and the assumed judgment for triple damages? In the face of the Seventh Amendment, could the District Court after jury trial and verdict then

[20] In the District Judge's memorandum opinion, he stated:

"Determinations that regulatory tariffs are just, reasonable and valid permeate every aspect of telephone communications regulation. * * * The antitrust laws and the precise ingredients of this case are among the relevant factors for FCC consideration in determining the justness, reasonableness, validity, application and effect of the tariff and practices here involved."

This is not, as supposed from some of the Judge's comments during colloquy or as asserted in appellant's brief, to be read as a predetermination that the FCC either would or could or should evaluate this in the traditional antitrust Sherman Act "rule of reason" concept, see FCC v. RCA Communications, Inc., supra; McLean Trucking Co. v. United States, supra, or that the question of reasonableness is even open for inquiry in the per se case, see note 10, supra; *but see* note 11, supra. The regulatory statutory standard of "just and reasonable" reflects many factors, including antitrust implications. See note 15, supra.

make a reference? Could the Court of Appeals? The Supreme Court?[21] If referred at that late stage what record would the FCC consider? The one hammered out under the narrow rules of episodic civil trial? A broad industry-wide survey with full administrative exploration of the scientific and technical problems? Assuming the ultimate FCC determination thereafter of applicability and validity, how or in what manner could this be applied to penetrate the foggy mystery of the jury's general verdict? To these questions we do not even begin to suggest an answer. Nor do the plaintiffs. They simply ignore them on the simple, but natural, desire that, through the incantation of these magic antitrust epithets, these serious problems about Tariff No. 132 and its effective enforcement will somehow go away.

Embracing fully and enthusiastically the proposition that "no fixed formula exists for applying the doctrine of primary jurisdiction" and that in "every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes is serves will be aided by its application in the particular litigation,"[22] this Court has given full voice to this device. And in nearly every instance where we order it, it ought first to have been ordered by the trial Court. Thus, contrary to the suggestion of appellants that as Judges we are in as good a position to read Tariff No. 132

[21] Cf. Clay v. Sun Ins. Office, Ltd., 1960, 363 U.S. 207, 80 S. Ct. 1222, 4 L.Ed. 2d 1170, on certification upon remand, Fla., 1961, 133 So. 2d 735, on receipt of answers to certification, 5 Cir., 1963, 319 F. 2d 505, rev'd, 1964, 377 U.S. 179, 84 S. Ct. 1197, 12 L.Ed. 2d 229; Hopkins v. Lockheed Aircraft Corp., 5 Cir., 1966, 358 F. 2d 347.

[22] United States v. Western Pac. R.R., 1956, 352 U.S. 59, 64, 77 S. Ct. 161, ..., 1 L.Ed. 2d 126, 132.

as the FCC, we sent a tariff construction problem to the ICC in *Louisville & N.R.R. v. Knox Homes Corp.*, 5 Cir., 1965, 343 F. 2d 887. There it was tariffese which created the problem. Here it is largely technological consideration as to the equipment, apparatus, etc., reasonably within the tariff's description. In *River Terminals Corp. v. Southwestern Sugar & Molasses Co.*, 5 Cir., 1958, 253 F. 2d 922, aff'd, 1959, 360 U.S. 411, 79 S. Ct. 1210, 3 L. Ed. 2d 1334, we ordered reference to the ICC of a serious problem of law under published tariffs. And in *Agricultural Transp. Ass'n v. King*, 5 Cir., 1965, 349 F. 2d 873, we sent to the FCC for initial determination the serious and far-reaching question of law concerning the interpretation and application of the Transportation Act and the interplay of the Agricultural Marketing Act, 12 USCA §1141.

The brief analysis which we have made demonstrates convincingly that the construction, application, and validity of Tariff No. 132 is a critical, if not decisive, issue. As in many other antitrust or similar cases, primary jurisdiction reference was imperatively called for.[23] *Far East Conference v. United*

[23] Indeed, the Telephone Companies have referred us to at least four cases in which the precise relationship of the antitrust laws to the jurisdiction of the FCC has been considered by District Courts. Marcom, Inc. v. American Tel. & Tel. Co., No. 43215, N.D. Cal., July 28, 1965; Western States Tel. Co. v. American Tel. & Tel. Co., No. 64-175-PH, S.D. Cal., July 28, 1964; Secrafone v. Illinois Bell Tel. Co., Civ. No. 60C-1022; N.D. Ill., 1961; Pastor v. American Tel. & Tel. Co., S.D N.Y., 1940, 76 F. Supp. 781. In each case it was alleged that the actions of the defendant telephone companies, taken in accordance with their foreign attachment and interconnection tariffs, had prevented the plaintiffs from marketing their various devices designed for attachment to or interconnection with the channels of the defendants, and that such actions thus violated the antitrust laws. In each case it was held that primary jurisdiction lay in the FCC and appropriate state commissions.

States, 1952, 342 U.S. 570, 72 S. Ct. 492, 96 L. Ed. 576; *United States Nav. Co. v. Cunard S.S. Co.*, 1932, 284 U.S. 474, 52 S. Ct. 247, 76 L. Ed. 408; *Pan American World Airways, Inc. v. United States*, 1963, 371 U.S. 296, 83 S. Ct. 476, 9 L. Ed. 2d 325; *Carnation Co. v. Pacific Westbound Conference*, 1966, ... U.S. ....., 86 S. Ct. ....., 15 L. Ed. 2d 709, as amended, ... U.S. ....., 86 S. Ct. ....., 15 L. Ed. 2d 851. Although *United States v. Radio Corp. of America, supra*, stands for the proposition that there is no necessity to invoke the primary jurisdiction of the FCC in an antitrust suit challenging a television acquisition,[24] the Court, contrasting television with the "pervasive regulatory scheme" prescribed in the Communications Act for telephone and telegraph companies, fully recognized that where tariff structures might be thrown "out of balance" and "sporadic action by federal courts" might "work * * * mischief," 358 U.S. at 350, 79 S. Ct. at ....., 3 L. Ed. 2d at 365, primary jurisdiction is available. So did the Court in *Silver v. New York Stock*

[24] Although this proposition is certainly laid down, it was unnecessary to the holding of the Court since the FCC had already approved the acquisition and there was nothing left for the Court but the task of accommodating the policies of the Communications Act to the aims of the antitrust laws. The Court indeed undertook this task, held that the approval of the FCC did not immunize the acquisition from the antitrust laws, and could have disposed of the case solely on this ground. See 3 Davis, Administrative Law §19.06, at 16 (1965 Supp.). This is precisely what the Court did in United States v. Philadelphia Nat'l Bank, supra. Assuming, but expressly not deciding, 374 U.S. at 353 n. 32, 83 S. Ct. at . . . . n. 32, 10 L.Ed. 2d at 939 n. 32, "the applicability of the doctrine (of primary jurisdiction) to merger-application proceedings before the banking agencies," the Court noted that "the present action would not be barred, for the agency proceeding was completed before the antitrust action was commenced," 374 U.S. at 353, 83 S. Ct. at . . ., 10 L.Ed. 2d at 939, and disposed of the case on the ground that the Comptroller's approval of the bank merger did not immunize the transaction from the operation of the antitrust laws.

Exchange, 1963, 373 U.S. 341, 83 S. Ct. 1246, 10 L. Ed. 2d 389.[25] That the ultimate decision of the FCC may not be an end to the matter is neither unexpected nor decisive. For the doctrine applies "even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined." *Far East Conference v. United States*, 1952, 342 U.S. 570, 574, 72 S. Ct. 492, ..., 96 L. Ed. 576, 582. Nor is it "even if the court thinks that the arrangement alleged to violate the antitrust laws cannot be legally approved by the agency" for "the court should still allow the agency first to pass upon the question." 3 Davis Administrative Law §19.07, at 40 (1958). Nor is a reference a prejudgment that the regula-

[25] In *Silver*, the Court held that "the Commission's lack of jurisdiction over particular applications of exchange rules means that the question of antitrust exemption does not involve any problem of conflict or coextensiveness of coverage with the agency's regulatory power," and noted that "this aspect of the statute * * * obviates any need to consider whether petitioners were required to resort to the Commission for relief before coming into Court." 373 U.S. at 358 & n. 12, 360, 83 S. Ct. at . . . . & n. 12, ..., 10 L. Ed. 2d at 400 & n. 12, 402. Pursing this further, the Court noted that "there is nothing built into the regulatory scheme which performs the antitrust function of insuring that an exchange will not in some cases apply its rule so as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends," and recognized in footnote 12 that "should review of exchange self-regulation be provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would be presented." *Ibid.* Here, to the contrary, not only can the parties resort to the FCC for a determination of whether the "practice" of the telephone companies pursuant to Tariff No. 132 is "just and reasonable," 47 USCA §205, with a right to have this determination reviewed in the appropriate Court of Appeals, see note 12, supra, but that determination must certainly include consideration of antitrust policies, see note 15, supra. These differences from the SEC scheme there in issue require that the Antitrust Court not decide this question until the FCC's determination makes it necessary, and then with the guidance of the FCC's resolution of the technical problem involved.

tory act or agency offers antitrust immunity as such for "reference to an administrative agency is not restricted to situations when the agency has the power to immunize."[26] *Maddock & Miller, Inc. v. United States Lines*, 2 Cir., 1966, ..., F. 2d ....., ... [1966 Trade Cases ¶ 71730, at 82301].

In affirming this primary jurisdiction reference to the FCC,[27] we must sound to all hands this caveat. In analyzing the contentions pro and con in the quest for seeking and identifying critical issues for initial administrative determination, nothing we have said or left unsaid, nothing expressed or implied, is to be considered as even a remote possible whisper of a suggestion as to how any one or more or all of the issues now disclosed or hereafter revealed are ultimately to be decided. All of those decisions are to be made first by the trial Judge when and after the primary jurisdiction reference has been concluded.

AFFIRMED.

---

[26] Contrary to appellants' contention, the trial Judge did not directly or impliedly pass on the question of immunity. This and all other questions were deferred pending reference to the FCC.

[27] While the effect of the order of reference is to impose on the appellants the burden of filing a complaint with the Commission, 47 USCA §208; 47 CFR §§1.701-735, the obligation to institute and prosecute such reference in good faith rests equally on the Telephone Companies as a condition to the continuation of the stay order. The Commission can on its own initiative order an investigation on whether a particular practice is "just and reasonable" and thereupon issue a cease and desist order, 47 USCA §205(a). More significant it may, in accordance with §5(d) of the APA, 5 USCA §1004(d), "on motion or its own motion issue a declaratory ruling terminating a controversy or removing uncertainty." 47 CFR §1.2. We again emphasize that nothing we have said here is intended to limit the manner in which the referred question (and all matters related thereto) are to be presented to the Commission, blueprint the type of proceeding to be followed by the Commission, limit the scope of the Commission's inquiry, delineate the factors to be considered by the Commission, or indicate the conclusion to be reached by either the Commission or the District Court after the former has acted.

United States Court of Appeals
FOR THE FIFTH CIRCUIT

October Term, 1965

No. 23556

D. C. Docket No. 3-1294-Civil Action

THOMAS F. CARTER and CARTER ELECTRONICS CORPORATION,
Appellants,

versus

AMERICAN TELEPHONE & TELEGRAPH COMPANY, et al.,
Appellees.

Appeals from the United States District Court for the Northern District of Texas.

Before BROWN and COLEMAN, Circuit Judges, and DAWKINS, District Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Thomas F. Carter and Carter Electronics Corporation, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

August 17, 1966

Issued as Mandate:

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APPENDIX B

Before the

Federal Communications Commission

WASHINGTON, D. C. 20554

Docket No. 16942

In the Matter of
Use of the Carterphone Device in
Message Toll Telephone Service

ORDER

At a session of the Federal Communications Commission held at its offices in Washington, D. C., on the 20th day of October 1966;

1. The Commission has under consideration the decision of the United States Court of Appeals for the Fifth Circuit in *Carter, et al. v. American Telephone and Telegraph Co., et al.*, (No. 23556, Slip Opinion, August 17, 1966) and the regulations published in American Telephone and Telegraph Company Tariff F.C.C. No. 132 (Message Toll Telephone Service) which purport to govern the extent to which telephone users may attach or connect devices to the facilities of the operating telephone companies for use in interstate or foreign message toll telephone service.

2. In the above-referred to decision the Court of Appeals affirmed a February 8, 1966, decision by the United States District Court for the Northern District of Texas, Dallas Division, wherein that District Court, in a private antitrust action for treble damages and injunctive relief filed by Thomas F. Carter and Carter Electronics Corporation against American Telephone and Telegraph Co. and the General Telephone Company of the Southwest, invoked the doctrine of primary jurisdiction and referred to this Commission for

resolution, the question of the justness, reasonableness, validity and effect of the tariff regulations and practices complained of in the aforesaid action and wherein the said District Court stayed the proceedings in the aforesaid action pending the conclusion of appropriate administrative proceedings initiated before the Commission, *Carter, et al. v. American Telephone and Telegraph Co., et al.*, (Memorandum Order filed February 8, 1966, Civil Action No. 3-1294).

3. In view of the foregoing, IT IS ORDERED, That, pursuant to the provision of Sections 201, 202, 203, 205, 403 and 411 of the Communications Act of 1934, as amended, a public hearing shall be held at a time and place to be hereinafter designated upon the following specific issues:

ISSUES

(a) The nature and extent of the public need and demand for the use of the Carterphone device in connection with interstate or foreign message toll telephone service;

(b) The effect, if any, of the use of the Carterphone device upon the operation of the telephone system used to provide interstate and foreign telephone message toll telephone services to the public or upon the employees and facilities of the telephone companies providing such services or upon the public in its use of such telephone system;

(c) Whether the provisions of Tariff F.C.C. No. 132 of American Telephone and Telegraph Company may properly be construed to prohibit any telephone user from attaching the Carterphone device to the facilities of the telephone companies for use in connection with interstate and foreign message toll telephone services;

(d) If the aforesaid tariff provisions may properly be construed to prohibit telephone users from attaching the Carterphone device to the facilities of the telephone companies for use in connection with interstate or foreign message toll telephone services:

(1) Whether such regulations are, or will be, unjust and unreasonable and, therefore, unlawful within the

meaning of Section 201(b) of the Communications Act of 1934, as amended, or are, or will be, unduly discriminatory or preferential in violation of Section 202(a) of said Act;

(2) Whether, in the light of facts developed in connection with the foregoing issues, the Commission, in accordance with the provisions of Section 205 of the Act, should prescribe tariff regulations which will permit the use of the Carterphone device in connection with interstate and foreign message toll telephone service and, if so, the kind of tariff regulation which should be so prescribed;

(e) If the aforesaid tariff regulations of the telephone companies may not properly be construed to prohibit telephone users from attaching the Carterphone device to the facilities of the telephone companies for use in connection with interstate or foreign message toll telephone services, what action, if any, should be taken by the Commission with respect thereto.

4. IT IS FURTHER ORDERED, That Thomas F. Carter, Carter Electronics Corporation, the American Telephone and Telegraph Co., the General Telephone Company of the Southwest, and the associated Bell System companies listed in the attached Appendix are hereby made parties respondent to this proceeding and a copy of this Order shall be served upon each such party respondent.

5. IT IS FURTHER ORDERED, That any concurring, connecting and other participating carrier, listed as such in the aforesaid tariff, the United States Independent Telephone Association, the General Telephone and Electronics Service Corporation, the National Association of Railroad and Utilities Commissioners and any state regulatory body is HEREBY GRANTED leave to intervene upon the filing of a notice of intention to appear and participate in these proceedings within 30 days from the date of the publication of this Order in the Federal Register.

6. IT IS FURTHER ORDERED, That a hearing examiner SHALL BE DESIGNATED to preside in the proceedings ordered herein who shall prepare an initial decision on all of the issues as provided in Section 1.267 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Released:
October 21, 1966

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 772

THOMAS F. CARTER AND CARTER ELECTRONICS CORPORATION,
Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
SOUTHWESTERN BELL TELEPHONE COMPANY, AND
GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
Respondents.

BRIEF OF RESPONDENTS AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND SOUTHWESTERN BELL TELEPHONE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 772

THOMAS F. CARTER AND CARTER ELECTRONICS CORPORATION,
Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
SOUTHWESTERN BELL TELEPHONE COMPANY, AND
GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
Respondents.

BRIEF OF RESPONDENTS AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND SOUTHWESTERN BELL TELEPHONE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This is a case seeking review of the exercise of discretion by the trial court in denying petitioners' application for a preliminary injunction in a private antitrust treble damage action. After hearing on respondents' motions to dismiss (R. 99, 145), the action was stayed by the trial court pending institution and completion of appropriate proceedings before the Federal Communications Commission, because the FCC was held to have primary jurisdiction to determine the justness, reasonableness, and validity of FCC tariff provisions which the antitrust action attacked. 250 F. Supp. 188-192 (App. A). This order staying the action was interlocutory and not appealable under the provisions of 28 U.S.C. § 1292(a). Several days later, petitioners made a motion for hearing on their application for preliminary injunction (R. 161). The trial court denied this motion "for the reasons stated" in the earlier memorandum order

(R. 162). The court of appeals, having held that this ruling constituted a denial of a preliminary injunction and was, therefore, appealable under the provisions of § 1292(a)(1), affirmed the trial court's action.

Petitioners claim damages for the alleged interference by respondents with their attempts to market the Carterfone, a device designed to permit the subscribers of respondent telephone companies to establish interconnections between the common carrier telephone channels of respondents and the channels of private mobile radio systems. The "interference" referred to is the enforcement by respondents of their FCC tariffs forbidding interconnection. The essence of petitioners' theory is succinctly contained in paragraph XI (R. 86) of their complaint, which alleges:

> "The Defendants and the aforementioned non-party telephone companies, in order to accomplish the violation of the federal antitrust laws heretofore set forth, have published a regulatory tariff which purports to prevent the use of a device similar to the *Carterfone as it relates to telephone company equipment*. Such tariffs are similar or identical to a typical tariff published by Defendant American Telephone and Telegraph Company known as AT&T Tariff FCC No. 132, Message Toll Telephone Service, the language of which is shown on Exhibit A attached hereto and incorporated herein. *Although the Plaintiffs deny that such tariff is a valid tariff and that such tariff is applicable to the Carterfone,* regardless of its validity and its application, the Defendants and the aforementioned non-party telephone companies have, as part of a common design and scheme, in uniformly publishing and enforcing such tariff, wrongfully used such tariff to accomplish a violation of the antitrust laws of the United States. Such tariff does not and may not authorize or excuse the aforementioned violation of the antitrust laws of the United States." (R. 86) (Emphasis supplied.)

The challenged tariffs embody the telephone industry's basic and long standing interconnection policies which have evolved over years of administrative proceedings and regulation. The tariffs are applied uniformly to interconnections, and respondents have a statutory duty to enforce such tariff provisions. Recognizing the need for accommodation of the antitrust laws to the pervasive regulatory scheme contemplated by the Communications Act of 1934, the district court stayed the action and referred the case to the FCC under the doctrine of primary jurisdiction for determination of the justness, reasonableness, and validity of the tariff provisions. 250 F. Supp. at 192 (App. A at 7a). On the basis of their complaint and ex parte affidavit, petitioners seek peremptory relief nullifying these tariffs.

The relevant facts are well stated by the Fifth Circuit Court of Appeals[1] which affirmed the district court's denial of a preliminary injunction and upheld the lower court's stay of the action pending proceedings in the FCC based on the doctrine of primary jurisdiction.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Texas (App. A) is reported at 250 F. Supp. 188. The opinion of the Court of Appeals for the Fifth Circuit (App. B) is reported at 355 F. 2d 486.

---

[1] Contrary to petitioners' assertion that only the complaint was before the lower courts, both courts took judicial notice of the records and orders of the Federal Communications Commission, as is their prerogative in considering a question of primary jurisdiction. *Interstate Natural Gas Co.* v. *Southern California Gas Co.*, 209 F. 2d 380, 385 (9th Cir. 1953); *Fletcher* v. *Jones*, 105 F. 2d 58 (D.C. Cir.), cert. denied, 308 U.S. 555 (1939); *Greeson* v. *Imperial Irr. Dist.*, 59 F. 2d 529 (9th Cir. 1932).

STATUTES AND REGULATIONS INVOLVED

Communications Act of 1934, 47 U.S.C. § 151, §§ 201-222 (App. C, pp. 1c-14c).

Sherman Act, §§ 1 and 2, 15 U.S.C. §§ 1 and 2 (App. C, pp. 14c-16c).

Clayton Act, §§ 3, 4, and 16, 15 U.S.C. §§ 14, 15, and 26 (App. C, pp. 16c-17c).

28 U.S.C. § 1292 (a)(1) (App. C, p. 17c).

AT&T Tariff FCC No. 132, § B.7, §§ B.24-B.28 § J (App. D).

QUESTION PRESENTED

Respondents submit that the first question presented by petitioners may be more accurately stated as follows:

> Was it an abuse of the trial court's discretion to deny a preliminary injunction after a stay of the antitrust treble damage action pending the institution and completion of appropriate proceedings before the Federal Communications Commission relating to the justness, reasonableness, and validity of the tariff provisions attacked in the action?

ARGUMENT

I.

THE COURT OF APPEALS WAS CORRECT IN AFFIRMING THE TRIAL COURT'S DENIAL OF PETITIONERS' REQUEST FOR A PRELIMINARY INJUNCTION.

A.

The courts below correctly held that the doctrine of primary jurisdiction requires that the FCC initially determine all questions relating to the tariff and tariff practices complained of by petitioners.

While the comprehensive opinions of the lower courts are so sound and unassailable in both law and logic on the issue of primary jurisdiction that together they constitute the best and most conclusive answer to the petition for writ of certiorari, respondents will briefly respond to the various arguments advanced by petitioners.

1.

Regulation of the interconnection of telephone channels with other communications channels has been entrusted to the FCC.

The regulation of the telephone industry poses problems of the highest complexity. The Congress of the United States long ago recognized that common carrier communications service must be provided on a public utility basis; that is, subject to careful and pervasive regulation, rather than with unregulated competition. The national communications policy as reflected in the Communications Act of 1934 (47 U.S.C. § 151, §§ 201-222) is broadly stated "to make available . . . to all the people of the United States

a rapid, efficient, nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges . . ." 47 U.S.C. § 151. To achieve these goals, the Communications Act grants a broad range of powers to the Federal Communications Commission. 47 U.S.C. §§ 201-222. Among other requirements, the telephone utility is required to file in its schedules and tariffs "the classification, practices, and regulations affecting such charges." 47 U.S.C. § 203(a). The "classification, practices, and regulations," as well as the charges, must be "just and reasonable." 47 U.S.C. § 201(b). The Commission is empowered to determine whether the filed tariffs are just, reasonable, and nondiscriminatory (47 U.S.C. § 205(a)) either on its own initiative or upon complaint filed by third parties. 47 U.S.C. § 208.

Further, the Commission has the power to prescribe such rules and regulations as are "necessary in the public interest" to carry out the provisions of the Act. 47 U.S.C. § 201(b). Each telephone company is required to file with the Commission, and to keep open for public inspection, a tariff setting forth its charges, classifications, regulations, and practices. 47 U.S.C. § 203(a). Such tariffs must be followed until such time as they are amended in the manner provided by the statute. 47 U.S.C. § 203(b). A telephone company may not provide service unless tariffs are filed covering such service and the company may not deviate from the rates, classifications, regulations, or practices contained in the tariffs so filed. 47 U.S.C. § 203(c). The Communications Act, therefore, presents an intricate and pervasive statutory structure of continuous regulation and administrative review, as this Court has recognized. *United States* v. *Radio Corp. of America*, 358 U.S. 334, 348 (1959).

Petitioners claim damages for the alleged interference by the respondents with petitioners' attempt to market the

Carterfone, a devise designed for petitioners' customers to use to establish an interconnection between the telephone channels of respondents and channels of private mobile systems. Petitioners claim that this "interference" through enforcement of FCC tariffs forbidding interconnections violates the antitrust laws. Petitioners' complaint in paragraph XI (R. 86) specifically alleges that "the Defendant . . . telephone companies, in order to accomplish the violation of the federal antitrust laws heretofore set forth, have published a regulatory tariff which purports to prevent the use of a device similar to the Carterfone as it relates to telephone company equipment." The tariff provisions referred to are §§ B.7 and B.24 of AT&T's Message Toll Telephone Service Tariff FCC No. 132, which petitioners attached to their complaint as Exhibit A (R. 90). These provisions (App. D at 1d) prohibit the interconnection of the respondents' communications channels with communications channels of others except as expressly provided in other sections of the tariff.[2]

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[2] Tariff FCC No. 132 sections which allow interconnections under certain conditions are as follows: Section B.25 (connection with facilities of power pipe line, and railroad companies pursuant to Tariff FCC No. 134); Section B.26 (connections with experimental satellite facilities through connection equipment provided by the telephone company); Section B.27 (connection with N.A.S.A. installations pursuant to Tariff FCC No. 134); Section B.28 (connections with certain facilities of the U. S. Army, Navy, and Air Force provided the appropriate Secretary of such Department certifies that connection is required by reason of military necessity); Section J (service through miscellaneous common carriers utilizing telephone company intra-exchange equipment). (App. D)

The Commission itself has advised petitioners in reply to an inquiry that use of the Carterfone device to effectuate interconnection appeared to violate respondents' tariff (R. 112; letter of M. J. Morris, Secretary of the FCC to Jeremiah Courtney, attorney for Carter Electronics Corporation, March 24, 1960).

As noted by both of the courts below, the gravamen of petitioners' action is a direct challenge to the validity of Tariff FCC No. 132. The challenged tariffs were filed in compliance with the Communications Act. They have the force of law and are binding on the respondents and their customers alike. *Crancer* v. *Lowden,* 315 U.S. 631, 635 (1942); *Atchison, T & S.F. Ry. Co.* v. *City of Chicago,* 240 F. 2d 930, 937 (7th Cir. 1957), *aff'd,* 357 U.S. 77 (1958); *Compania Anonima Venezolana De Nav.* v. *A. J. Perez Exp, Co.,* 303 F. 2d 692, 696 and n. 12 (5th Cir.), *cert. denied,* 371 U.S. 942 (1962); *United States* v. *Associated Air Transport, Inc.,* 275 F. 2d 827 (5th Cir. 1960). When placed against the comprehensive regulatory scheme of the Communications Act, respondents submit that it is clear that a dispute involving the basic interconnection policy of interstate telephone companies must first be brought before the regulatory agency created by Congress specifically for the determination of questions of this nature.

2.

The doctrine of primary jurisdiction requires that issues relating to the validity, justness, and reasonableness of the challenged tariff be first determined by the Federal Communications Commission.

The doctrine of primary jurisdiction, which was judicially created to insure effective regulation, is a procedural device under which a court refrains from exercising its jurisdiction pending preliminary administrative determination of the matters referred by it to the administrative

agency. 3 *Davis, Administrative Law*, § 19.01, *et seq.* (1958). "The principal reason behind the doctrine is recognition of the need for orderly and sensible coordination of the work of agencies and of courts." 3 *Davis, Administrative Law*, § 19.01 at 5 (1958). Thus, the doctrine of primary jurisdiction "is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties . . . [and] applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *United States* v. *Western Pacific RR Co.*, 352 U.S. 59, 63 (1956); see also, *Far East Conference* v. *United States*, 342 U.S. 570, 572 (1952).

As noted by both the district court and the Court of Appeals for the Fifth Circuit, all of the grounds for the application of the doctrine of primary jurisdiction are met in this case. There is clearly a necessity for uniformity. Conflicting decisions reached in district courts throughout this country would completely frustrate the attempts of the FCC to effectuate the statutory scheme of regulation set forth in the Communications Act, including both supervision of technical standards and supervision of costs and charges. Telephone companies would be faced with the dilemma of contradictory orders from the courts and from the FCC. Further, the adoption of polyglot technical and mechanical standards throughout the country could raise great difficulty in the operation and maintenance of the interstate telephone network. Petitioners assert that there is no necessity for the FCC to make an initial determination regarding the validity of the nation-wide interconnection

tariff. At the same time they seek to abrogate and render ineffective such tariff. This position is contradictory on its face.

United States v. *Radio Corp. of America*, 358 U.S. 334, 348 (1959), indicates clearly that the doctrine of primary jurisdiction is to be applied in antitrust cases involving the telephone industry. In that case, this Court distinguished between television broadcasters, which are not included in the definition of common carriers in the Communications Act, and the telephone industry. The Court pointed out that the telephone companies are controlled under a pervasive regulatory scheme, and recognized that in such situation where tariff structures might be thrown "out of balance" and "sporadic action by several courts" might "work . . . mischief", 358 U.S. at 350, primary jurisdiction is applicable. Also squarely supporting the lower courts' holdings is *Ambassador, Inc.* v. *United States*, 325 U.S. 317 (1945), where it was stated that "the supervisory power of the Commission is not limited to rates and to services, but . . . the Commission's range of power over regulated companies [extends to] . . . 'charges, practices, classifications, and regulations for and in connection with such communication service'." The Court further said that "where the claim of unlawfulness of a regulation is grounded in lack of reasonableness, the objection must be addressed to the Commission and not as an original matter brought to the court." 325 U.S. at 323-25.

Finally, this Court's recent decision in *Carnation Co.* v. *Pacific Westbound Conf.*, 383 U.S. 213 (1966), confirms the lower courts' application of the doctrine of primary jurisdiction. The plaintiff in *Carnation* attacked certain ratemaking agreements on the ground that they had not been approved by the Federal Maritime Commission and were per se violations of the antitrust laws. The defendants

argued, *inter alia*, that the rate making was done pursuant to a 1952 agreement which had been approved by the FMC. This Court held that the doctrine of primary jurisdiction must be applied in a case challenging conduct of "debatable legality" even where it is alleged that the conduct is without any agency approval or sanction. 383 U.S. at 220. It emphasized that courts must "refrain from taking action which might interfere with the Commission exercise of its lawful powers." The Court clearly recognized that a primary determination of whether the rates challenged were within the approved orders of the Commission must be made by the Commission and that the lower court should have stayed the case pending a final outcome of the FMC proceedings. It is equally clear here that an initial determination of whether the FCC tariff prohibition of interconnections by use of the Carterfone is valid, just, and reasonable must be made by the FCC and that the lower courts properly stayed the case for that purpose.[3]

3.

There is no conflict between this decision and the cases relied upon by petitioners.

Petitioners have asserted that respondents' conduct constitutes a per se violation of antitrust laws and, therefore,

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[3] As noted by the court of appeals, like decisions have been reached in at least four other cases: *Marcom, Inc.* v. *AT&T*, Civ. No. 43215 (N.D. Cal. 1965) (Unreported Decision: R. 134); *Western States Tel. Co.* v. *AT&T*, Civ. No. 64-175 PH (S.C. Cal. 1964) (Unreported decision; R. 142); *Secrafone* v. *Illinois Bell Tel. Co.*, Civ. No. 60C 1022 (N.D. Ill. 1961); and *Pastor* v. *AT&T Co.*, 76 F. Supp. 781 (S.D. N.Y. 1940). "In each case it was alleged that the actions of the defendants, taken in accordance with their foreign attachment and interconnection tariff provisions, had prevented plaintiffs from marketing their various devices designed for attachment to or interconnection with the channels of the defendants. Plaintiffs alleged that such interference constituted a violation of the antitrust laws. In each case it was held that primary jurisdiction of the action lay in the FCC and appropriate state commissions." 364 F. 2d at 498 (App. B at 22b).

the doctrine of primary jurisdiction has no application in the instant case. Petitioners in effect argue that concerted conduct which constitutes a per se violation of the antitrust laws in a non-regulated industry necessarily constitutes a per se violation of the antitrust laws in a regulated industry. This is an incorrect view of the law. Examination must be made to determine whether accommodation of the antitrust laws and the regulatory scheme contemplated by the appropriate regulatory statutes justifies or necessitates whatever restraint may occur under a particular regulatory provision. As this Court has held, traditional antitrust concepts have sufficient flexibility when applied to a regulated industry to permit the mandate of the regulatory statute to be carried out. *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 360-61 (1963); *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 80 (1944); *Keogh* v. *Chicago & Northwestern Ry.*, 260 U.S. 156, 162 (1922). Both of the courts below appropriately recognized this established principle in applying the doctrine of primary jurisdiction. 365 F. 2d at 492-93 (App. B at 11b); 250 F. Supp. 190 (App. A at 4a).[4]

Petitioners also seek to avoid the doctrine of primary jurisdiction with the argument that no immunity from the antitrust laws is conferred upon the regulated telephone companies by the Communications Act of 1934 and, there-

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[4] Despite petitioners' reliance thereon, *Georgia* v. *Pennsylvania RR Co.*, 324 U.S. 439 (1945), does not in any manner conflict with the position on primary jurisdiction reached by the lower courts. This Court in *Georgia* permitted the State of Georgia to seek injunctive relief against an alleged rate-seeking conspiracy *but held that regulatory tariffs could not be attached through the vehicle of an antitrust suit*, stating:

> "Georgia in this proceeding is not seeking an injunction against the continuance of any tariff; nor does she seek to have any tariff provision changed." 324 U.S. at 455.

Contrast this to the position of petitioners who seek to have respondents enjoined from obeying and enforcing the interconnection provisions of Tariff FCC No. 132.

fore, the doctrine is inapplicable.[5] This argument is clearly erroneous for the doctrine applies whether immunity is conferred or not. *United States Nav. Co.* v. *Cunard S.S. Co.*, 384 U.S. 474, 487 (1932); *Far East Conf.* v. *United States*, 342 U.S. 570, 575 (1952); *Maddock & Miller, Inc.* v. *United States Lines*, 365 F. 2d 98, 102 (2d Cir. 1966); 3 *Davis Administrative Law*, § 19.07 at 40 (1958). See also the court of appeals opinion below, 365 F. 2d at 499 (App. B at 24b).

California v. *Federal Power Comm'n*, 369 U.S. 482 (1962), and *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963), relied upon by petitioners, are not contrary to the position of the courts below. Both are cases involving mergers challenged under Section 7 of the Clayton Act. This Court has recognized that the legislative policy behind Section 7 requires reservation to the courts of the resolution of the complex competitive issues presented by mergers. *California* v. *Federal Power Comm'n*, 369 U.S. at 487-90. In *Philadelphia Bank* the appropriate agency proceeding had been completed prior to the commencement of the antitrust action, thereby removing any possible need for administrative referral. 374 U.S. at 353. In *California* the trial court did not seek to utilize the primary jurisdiction doctrine. Rather the defendants there sought to deprive the trial court of jurisdiction by beginning a collateral administra-

[5] It must be noted that respondents have not contended that the Communications Act "immunizes" them from the application of the antitrust laws, nor has either of the lower courts so held. Respondents have only urged and the lower courts have only held that the FCC must first determine the justness, reasonableness, and validity of the tariff provisions prohibiting Carterfone interconnections before the courts can adjudicate the antitrust issues. 365 F. 2d at 498 (App. B. at 21b et seq); 250 F. Supp. at 192 (App. A at 7a). The effect to be given the agency decision is to be determined when that issue is reached in the antitrust trial (365 F. 2d at 499, App. B at 24b, 25b), and no such question is now before the Court.

tive proceeding. Thus neither case even involved the propriety of the exercise of the doctrine of primary jurisdiction.

In summary, it is apparent from the face of the complaint that petitioners claims for damages and demand for injunction inescapably raise the question of how and by whom the interconnection of telephone channels is to be regulated. Petitioners' claims involve a direct attack upon the respondents' interconnection tariffs which have been filed with and are subject to the broad regulation of the FCC. No clearer case requiring the application of the doctrine of primary jurisdiction can be imagined, and the carefully reasoned opinions of the trial court and of the court of appeals, affirming the trial court's stay of the action pending the FCC proceedings, were clearly correct.[6]

B.

The grant or refusal of a preliminary injunction was in the sound discretion of the trial court.

Regardless of the propriety of the trial court's finding of primary jurisdiction in the FCC, the grant or refusal of a preliminary injunction was in the sound discretion of

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[6] On October 20, 1966, the Federal Communications Commission took cognizance of the opinions of the two lower courts and upon its own motion commenced a proceeding (FCC Docket No. 16942) to determine the reasonableness of the subject tariff provisions as applied to the use of Carterfone (Appendix E). The prehearing conference was held on November 17, 1966, before the Commission Hearing Examiner appointed to conduct the proceeding. Following such conference an order was entered on November 21, 1966, specifying the procedures to be followed in presenting evidence on the designated issues (Appendix F). This order requires that the respondent telephone companies and the petitioners exchange copies of the sworn written testimony to be put in exhibit form, lists of witnesses whose evidence will be presented orally, and a brief statement as to the scope of each witnesses' testimony. This evidence is to be directed to the first three of the five issues previously specified by the commission. The hearing is scheduled to commence on January 23, 1967 (App. F).

the trial court. The standard on review is abuse of discretion. *Yakus* v. *United States,* 321 U.S. 414 (1944); *Nalco Chemical Co.* v. *Hall,* 347 F. 2d 90 (5th Cir. 1960); *Home Decorators, Inc.* v. *Herfort,* 179 F. 2d 398 (5th Cir. 1950); *United States* v. *Corrick,* 298 U.S. 435 (1936); 3 *Barron & Holtzoff, Federal Practice & Procedure* § 1433 (Wright ed. 1958). Consequently, at this stage of the proceedings the merits of a case are not usually to be decided. *Tatum* v. *Blackstock,* 319 F. 2d 397 (5th Cir. 1963); *Barnwell Drilling Co.* v. *Sun Oil Co.* 300 F. 2d 298 (5th Cir. 1962); *Miami Beach Federal Savings & Loan Ass'n* v. *Callander,* 256 F. 2d 410 (5th Cir. 1958). The trial court in exercising his discretion "balances the convenience of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction." *Yakus* v. *United States, supra; Wooton* v. *Ohler,* 303 F. 2d 759, 762 (5th Cir. 1962). Where important public interests are at stake, especially in the preliminary stage of proceedings, where neither the facts nor law are clearly in favor of the moving parties, a court should withhold injunctive relief until there has been a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff. *Yakus* v. *United States, supra; Huard-Steinheiser Inc.* v. *Henry,* 280 F. 2d 79, 83 (6th Cir. 1960); *Miami Beach Federal Savings & Loan Ass'n* v. *Callendar, supra.*

Petitioners sought through preliminary injunction to obtain affirmative relief which would have drastically altered the status quo. Petitioners had been advised for over five years prior to the institution of this law suit that the use of their device with the public utility telephone facilities of respondent was contrary to the applicable interconnection tariff provisions (R. 112-14). Nonetheless, upon instituting their suit, they requested that a United States district court by a preliminary order prohibit the enforcement

of such tariff provisions which have embodied the basic interconnection policy of the telephone industry evolved through years of regulation and administrative proceedings. Disruption of the status quo has long been held in disfavor by the courts. *Celebrity, Inc.* v. *Trino, Inc.*, 264 F. 2d 956, 958 (1st Cir. 1959); *Miami Beach Federal Savings & Loan Ass'n* v. *Callendar*, *supra* at 415.

Both the district court, 250 F. Supp. at 192, and the court of appeals, 356 F. 2d at 496, recognized that the nullification of the tariff by injunction prior to reference to the FCC could disrupt the regulatory scheme contemplated by the Communications Act of 1934 and create "operational chaos." This would be clearly contrary to the public interest.

The courts have held in antitrust suits that preliminary injunction relief should be denied where it would inflict irreparable injury upon the enjoined parties. *United States* v. *Standard Oil Co.* (Ind.), 1961 Trade Cases ¶70,131 (N.D. Calo 1961); *United States* v. *FMC Corp.*, 218 F. Supp. 817, 832 (N.D. Cal. 1963), *app. dismissed for want of juris.*, 321 F. 2d 534 (9th Cir. 1963), application for preliminary injunction denied, by Goldberg, J., in chambers, 11 L. Ed. 2d 20 (1963). Clearly respondents would be irreparably injured if forced to operate their nationwide system without an effective interconnection tariff.

Further, petitioners' allegations in support of their motion for a preliminary injunction have been limited to the claim of lost sales. (See Petitioners' Motion for Preliminary Injunction R. 92-98.) Petitioners have never alleged or offered to prove any facts tending to show irreparable injury. Section 16 of the Clayton Act, 15 U.S.C. § 26, the controlling statute in private antitrust suits, explicitly requires that a plaintiff make "a showing that the danger of irreparable loss or damage is immediate." The mere allegation or showing of acts in violation of the antitrust laws

gives no standing to obtain a preliminary injunction, because the authority to seek injunctive relief to vindicate the public interest by enforcing the antitrust laws is vested exclusively in the Attorney General of the United States, § 15 of the Clayton Act, 15 U.S.C. § 25. See *United States v. Borden Co.*, 347 U.S. 514, 518.

The foregoing facts and authorities conclusively demonstrate that the trial court's denial of the preliminary injunction was correct.

II.

THE LOWER COURT'S ORDER DOES NOT FALL WITHIN THE RESTRICTED CLASS OF CASES APPEALABLE UNDER THE COLLATERAL ORDER DOCTRINE.

Perhaps recognizing that the denial of their application for preliminary injunction presents merely the question whether the trial court abused its discretion, petitioners conditionally urge that the primary jurisdiction order is appealable under the collateral order doctrine. This Court has long recognized a small class of orders, which are offshoots of the principal litigation, as being appealable under the collateral order doctrine. Respondents submit that petitioners are clearly wrong in asserting that the primary jurisdiction order falls within this class. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

Cohen was a stockholder's derivative action where federal court jurisdiction was predicated solely on diversity of citizenship. The trial court refused a motion to require the plaintiff to post a bond to indemnify the defendants for expenses and attorney's fees if the plaintiff did not prevail in the suit, such indemnity bond being required by state law. This Court held the order refusing to require the

indemnity bond as a predicate for the prosecution of the suit was appealable because the defendants would lose the protection of an indemnity bond forever if the case were permitted to proceed to final judgment on the merits without it. It held that the order was appealable because it would have "a final and irreparable effect on the rights of the parties." Since the propriety of the trial court's application of the doctrine of primary jurisdiction can be reviewed on appeal from final judgment, it does not have "final and irreparable effect on the rights of the parties." This is demonstrated by the stay order itself which provides that "jurisdiction remains in the court to pass ultimately upon the antitrust issues" (R. 156).

Clearly, the instant appeal does not involve a decision falling within the "small class" of collateral orders which are "not an ingredient of the cause of action." The issue of primary jurisdiction in the FCC and the trial court's stay on the basis thereof go to the very heart of petitioner's action. Petitioners have not suffered, nor can they show irreparable injury if they do not obtain review immediately of the trial court's order. Petitioners having failed to meet the strict requirements of the doctrine, this court is without jurisdiction to review the primary jurisdiction decision by use of the collateral order doctrine. See, 6 *Moore, Federal Practice,* ¶54.14 (1965); 3 *Barron & Holtzoff, Federal Practice and Procedure* § 1193.3 (Wright ed. 1958); Note, Appealability in the Federal Courts, 75 *Harv. L. Rev.* 351, 364-67 (1962).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Leroy Jeffers, an attorney for Respondents American Telephone and Telegraph Company and Southwestern Bell Telephone Company, depose and say that I have this day served copies of the foregoing Brief by mailing the same by United States certified mail, return receipt requested, postage prepaid, to the following counsel of record for Petitioners in said case:

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.....
Leroy Jeffers

Subscribed and sworn to before me on this the 12th day of December, 1966.

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Notary Public in and for
Harris County, Texas

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APPENDIX A

United States District Court

N. D. TEXAS

THOMAS F. CARTER AND
CARTER ELECTRONICS CORPORATION,
Plaintiffs,

v.

AMERICAN TELEPHONE AND TELEGRAPH
COMPANY, ET AL,
Defendants.

Civ. A. No. 3-1294

ESTES, Chief Judge
February 8, 1966

Plaintiffs, Thomas F. Carter and Carter Electronics Corporation, claim that they manufacture and sell a device called the "Carterfone," which permits a person receiving an incoming telephone call to transmit such call from the location received to another location by the use of two-way radio communication. The party receiving the incoming telephone call places the telephone receiver handset on a cradle which forms part of the Carterfone; and by process of induction, "without any electrical connection," the two-way radio communication system is activated, and the telephone caller can communicate with another person who may be located several miles away from the telephone receiver. Plaintiffs assert that defendants, American Telephone and Telegraph Company, Southwestern Bell Telephone Company and The General Telephone Company of

the Southwest, using their monopoly powers over telephone communications, have conspired to and did prevent plaintiffs from selling their device by threats to prospective customers that their telephone service would be discontinued if they used plaintiffs' device, thereby substantially lessening competition between the Carterfone and defendants' mobile radio-telephone units and tending to create and further maintain defendants' monopoly over such products, all in violation of the antitrust laws, 15 U.S.C. 1, 2, and 14, for which plaintiffs seek treble damages and injunctive relief.

Portions of AT&T Tariff FCC No. 132, "Message Toll Telephone Service," are attached as Exhibit "A" to plaintiff's Complaint. Section 7 of the Tariff gives the Telephone Company the right to suspend or terminate service if an unauthorized device is "attached to or connected with the facilities furnished by the Telephone Company, whether physically, by induction or otherwise, except as provided in this Tariff."

Section 24 authorizes miscellaneous devices provided by the telephone customer "provided any such device so used would not endanger the safety of Telephone Company employees or the public; damage, require change in or alteration of, or involve direct electrical connection to, the equipment or other facilities of the Telephone Company; or interfere with the proper functioning of such equipment or facilities; or impair the operation of the telephone system or otherwise injure the public in its use of the Telephone Company's services."

In their complaint plaintiffs state that:

> ". . . Although the Plaintiffs deny that such tariff is a valid tariff and that such tariff is applicable to the Carterfone, regardless of its validity and its applica-

> tion, the Defendants and the aforementioned non-party telephone companies have, as part of a common design and scheme, in uniformly publishing and enforcing such tariff, wrongfully used such tariff to accomplish a violation of the antitrust laws of the United States . . ."

The defendants have filed motions to dismiss on the grounds that primary jurisdiction lies with the Federal Communications Commission and that the complaint fails to state a claim upon which relief can be granted.

The Communications Act (47 U.S.C. 151, *et seq*) was enacted for the stated purpose of regulating interstate commerce in communication by wire and radio so as to make available "a rapid, efficient, nation-wide and world-wide" communication service with adequate facilities at reasonable charges and created the Federal Communications Commission to execute and enforce the provisions of the Act. The Commission's authority and responsibility encompass "charges, practices, classifications, and regulations for and in connection with such communication service" which must be just and reasonable (47 U.S.C. 201(b)); the common carrier may not make any unjust or unreasonable discrimination in charges or practices directly or indirectly by any means or devices (47 U.S.C. 202(a)); no change may be made in such charges, classifications, regulations or practices except after thirty days' notice to the Commission and to the public (47 U.S.C. 203(b)); telephone companies may not participate in communication unless schedules have been filed and published in accordance with the provisions of the Act (47 U.S.C. 203(c)); whenever a new charge, classification, regulation or practice is filed with the Commission, the Commission may, upon complaint or upon its own initiative, "enter upon a hearing concerning the lawfulness thereof" (47 U.S.C. 204) and prescribe the just and reasonable charges or practices (47 U.S.C. 205); "(a)ny

person . . . complaining of anything done or omitted to be done by any common carrier . . . may apply to said Commission (and) . . . (i)f . . . there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper" (47 U.S.C. 208); and the Commission has the power to require any telephone company "to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier" (47 U.S.C. 214 (d)). The Federal Communications Commission administers a "pervasive regulatory scheme" for telephone companies. When the antitrust policy of free competition is placed beside so pervasive a regulatory scheme involving rates and practices of those providing telephone service to the public, some resolution is obviously necessary. The regulatory agency which is expert in, and responsible for, administering the controls should be given the opportunity to determine all questions within its special competence

> "as an aid to the courts in resolving federal antitrust policy and federal regulatory patterns into a cohesive whole. . . . Accordingly, this Court consistently held that when rates and practices relating thereto were challenged under the antitrust laws, the agencies had primary jurisdiction to consider the reasonableness of such rates and practices in the light of the many relevant factors including alleged antitrust violations, for otherwise sporadic action by federal courts would disrupt an agency's delicate regulatory scheme, and would throw existing rate structures out of balance." *United States* v. *R. C. A.*, 358 U.S. 334, 348.

In an unusually careful and comprehensive opinion applying the doctrine of primary jurisdiction, the Eighth Circuit has held in *McCleneghan* v. *Union Stock Yards Co. of*

Omaha, 298 F. 2d 659 (1962), a private antitrust action against the stockyards company for treble damages, that the Court should refuse to assume jurisdiction as to an issue subject to the Secretary of Agriculture's power of regulation under the Packers and Stockyards Act, 7 U.S.C.A. §§ 201-203 and 205-217(a), but held that the Court should retain jurisdiction pending proceedings before the Secretary. Provisions of the Packers and Stockyards Act requiring exercise of primary jurisdiction by the Secretary of Agriculture are analogous to those in the Communications Act.

McCleneghan, 298 F. 2d 659, 665, 666, contains the following Supreme Court pronouncements regarding primary jurisdiction of administrative bodies:

> " 'Whenever a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. . . . It is required because the inquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. . . .' " *Great Northern R. Co.* v. *Merchants Elevator Co.,* 1922, 259 U.S. 285, 291;
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> * * *
>
> " 'The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. . . . "Primary jurisdiction" . . . comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views. . . .' " *United States* v. *Western Pac. R. Co.,* 1956, 352 U.S. 59, 63-64; and

> "'(A)gencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. . . .'" *Far East Conference* v. *United States* (an antitrust case), 1952, 342 U.S. 570, 574-575.

Questions with respect to the "value and quality of telephone service" resulting from interconnections as well as whether the tariff provisions were reasonable and in the public interest (*Peters Sunset Beach* v. *Northwestern Bell Tel. Co.*, 60 PUR 3d 363, 370 (Minn. R. R. and Warehouse Comm'n., 1965)) and whether there is any deterioration in the efficiency of service because of the interconnections (*City of Los Angeles* v. *Southern California Telephone Company*, 2 PUR (N.S.) 247 (California R. R. Commission, 1933)) have been resolved in proceedings initiated before administrative bodies.

Determinations that regulatory tariffs are just, reasonable and valid permeate every aspect of telephone communications regulation. The sections of the AT&T Tariff quoted above leave no doubt that the validity, application and effect of this tariff involve technical and complex matters within the special competence and "expertise" of the Federal Communications Commission. The revenues the telephone companies receive from mobile radio-telephone communication services, which plaintiffs say compete with their device, may be considered in setting rates for the Telephone Company. Thus, any action by this Court bypassing the FCC might disrupt that agency's delicate regulatory scheme and throw existing rate structures out of balance.

The antitrust laws and the precise ingredients of this case are among the relevant factors for FCC consideration

in determining the justness, reasonableness, validity, application and effect of the tariff and practices here involved. *McCleneghan* v. *Union Stock Yards Co. of Omaha, supra.* "(R)esort to the courts is still open after the agency has acted, (and) the doctrine (of primary jurisdiction) applies even if the agency has no jurisdiction to grant the relief sought." 3 Davis, *Administrative Law Treatise,* 1958, §19.07. Accordingly, the defendants' Motion to Dismiss should be and is denied.

The Court is of the opinion, however, that primary jurisdiction in a case of this kind to resolve all questions relating to the justness, reasonableness, validity and effect of the tariff and practices complained of is vested in the Federal Comunications Commission, the agency charged with maintenance of a pervasive regulatory system over the telephone industry, and that all proceedings herein should be stayed and held in abeyance* pending the conclusion of appropriate administrative proceedings initiated before the Federal Comunications Commission and that jurisdiction remains in the Court to pass ultimately upon the antitrust issues.

It is so ORDERED

s/s Joe E. Estes
UNITED STATES DISTRICT JUDGE

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* *Louisville & Nashville Railroad Co.* v. *Knox Homes Corp.*, 343 F. 2d 887 (5 Cir. 1965); *McCleneghan* v. *Union Stock Yards Co. of Omaha*, 298 F. 2d 659 (8 Cir., 1962).

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APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23556

THOMAS F. CARTER and CARTER ELECTRONICS CORPORATION

Appellants,

versus

AMERICAN TELEPHONE & TELEGRAPH COMPANY, ET AL,

Appellees.

Appeals from the United States District Court for the Northern District of Texas.

No. 23557

THOMAS F. CARTER and CARTER ELECTRONICS CORPORATION,

Appellants,

versus

HONORABLE JOE E. ESTES, Chief Judge, United States District Court, Northern District of Texas, ET AL,

Appellees.

On Petition for Writ of Mandamus to the United States District Court for the Northern District of Texas.

(August 17, 1966.)

Before BROWN and COLEMAN, Circuit Judges, and DAWKINS, District Judge.

BROWN, Circuit Judge: At issue here is whether a District Court in a private antitrust action for triple damages and injunctive relief should invoke the doctrine of primary jurisdiction to refer a question of tariff validity to the regulatory agency. It comes to us from a denial of a preliminary injunction. We agree with the District Court's primary jurisdiction reference to the Federal Communications Commission and affirm.

I.

At the outset we conclude that we have jurisdiction of the appeal under 28 USCA § 1292(a)(1) as a denial of a preliminary injunction and the Telephone Company's motion to dismiss the appeal must accordingly be denied.

We need only briefly sketch the chronology. The complaint, filed November 29, 1965, was accompanied by a separate formal motion for preliminary injunction. The plaintiffs-appellants requested an early setting which would include the application for preliminary injunction. Thereafter by an exchange of letters among counsel and the Court and an informal pretrial conference in mid-December, the Judge extended the time for the defendants' responsive motions or answers to January 14, 1966. The defendants filed a motion to dismiss on the dual ground (a) asserting primary jurisdiction in the FCC and (b) failure to state a claim. The Court subsequently fixed a hearing for February 7, 1966, and by the Court's direction, this hearing

was to be (and was) confined to the motions to dismiss. At the conclusion of the extended hearing February 7, the Judge announced orally his decision denying the motion to dismiss for failure to state a claim, but holding the case in abeyance until determination of the tariff's validity by the FCC. This was followed February 8 by a formal written memorandum order. Subsequently on February 16, the plaintiffs-appellants filed separate motions for rehearing and for a hearing on the motion for preliminary injunction. On February 24, each motion was denied.[1]

Thus there is no doubt that both by the initial prayer in the complaint and by formal motion, the plaintiffs-appellants sought a preliminary injunction. Equally uncontradicted is the fact that such injunction was not granted. But, appellees argue, it is not that simple. On their theory, the Court having on February 8 put the case in abeyance pending reference to the FCC, the application for preliminary injunction was but a part of the case thus deferred, for the Court did not deny the preliminary injunction, only the hearing thereon. Consequently, the argument runs, the formal motion for a preliminary injunction was but a paper means of casting the primary jurisdiction reference ruling into an appealable form and not, as it really was, a mere stay order. This rests, in turn, on the generally accepted proposition that orders merely staying further action pending some event are not generally appealable.[2]

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[1] The order as to preliminary injunction stated:

> "Having duly considered Plaintiffs' Motion for Hearing on Preliminary Injunction filed herein on February 16, 1966, the Court is of the opinion that for the reasons stated in its Memorandum Order entered herein on February 8, 1966, such Motion should be and is hereby DENIED."

[2] Republic of China v. National City Bank, 2 Cir., 1952, 194 F. 2d 170; Brande v. S & S Mach. Co., 2 Cir., 1958, 252 F. 2d 297; International Nickel Co. v. Martin J. Barry, Inc., 4 Cir., 1953, 204 F. 2d 583; United Gas Pipeline Co. v. Tyler Gas Serv. Co.,

On this reading, the Judge was simply declining to entertain any requests until after the reference. But we read it differently. In the colloquy at the end of the February 7 hearing the Judge made it plain that the plaintiffs could file and he would consider all motions desired. The Judge did not treat the reference order as a ground merely for not *considering* the request for preliminary injunction. Rather, he treated the reference order as the *reason* why the injunction should be denied. It is, of course, the denial of a preliminary injunction, not the validity of the reasons therefor, which triggers the interlocutory appeal as a matter of right under § 1292(a)(1). Our conclusion is not in any sense at odds with *Allied Air Freight, Inc.* v. *Pan American World Airways*, 2 Cir., 1965, 340 F. 2d 160, cert. denied, 381 U.S. 942, 85 S.Ct. 1560, 14 L. Ed. 2d 683, or *American Airlines, Inc. v. Forman*, 3 Cir., 1953, 204 F. 2d 230, cert. denied, 346 U.S. 806, 74 S.Ct. 54, 98 L. Ed. 336. In *Allied Air Freight* the unsuccessful plaintiffs in a triple damage action (not injunction) sought to make the stay a vicarious granting of a preliminary injunction. On familiar principles, see note 2, *supra*, this would not work. In *American Airlines* the defendant sought to appeal from a denial of its motion to dismiss on the ground that primary jurisdiction was in the CAB. Not unexpectedly the Court of Appeals found no appealable order and also denied relief by mandamus.

The serious question of primary jurisdiction reference is therefore properly before us.[3]

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5 Cir., 1957, 247 F. 2d 681, cert. denied, 355 U.S. 895, 78 S. Ct. 263, 2 L. Ed. 2d 193; Jackson Brewing Co. v. Clarke, 5 Cir., 1962, 303 F. 2d 844, cert. denied, 371 U.S. 891, 83 S. Ct. 190, 9 L. Ed. 2d 124; United States v. Richardson, 5 Cir., 1953, 204 F. 2d 552; 6 Moore, Federal Practice. § 54.07.

[3] The companion case for mandamus (No. 23,557) is dismissed as is the effort to appeal the February 8 stay order after denial of certification by the trial Court under 28 USCA § 1292(b).

II.

In analyzing the plaintiffs' complaint, it is well to bear in mind their blunt, bold position. The appellants claim that the trial Court by applying the doctrine of primary jurisdiction has effectively precluded them from obtaining the antitrust relief which they seek. Further, it is their position that the doctrine of primary jurisdiction does not apply because administrative agency approval does not immunize the Telephone Company's conduct from the operation of the antitrust laws, especially where the violation of those laws is claimed to be *per se* since an administrative determination of reasonableness would be irrelevant, and because there are no issues relevant to a disposition of the case at bar which require administrative expertise for their determination.

The complaint sought triple damages and injunctive relief under the antitrust laws. 15 USCA §§15, 22. Only two defendants were named and served, A.T.&T. and General.[4] These two along with 26 other named, but nonparty, telephone companies, 19 of which are owned and controlled by A.T.&T. were alleged to have jointly and severally conspired as a part of a common design to prevent the plaintiffs from marketing and distributing their Carterphone device.

With the flexibility given § 1292(b) by this Circuit, unlike some others, Hadjipateras v. Pacifica S.A., 5 Cir., 1961, 290 F. 2d 697, 1961 AMC 1417, Agricultural Trans. Ass'n. v. King, 5 Cir., 1965, 349 F. 2d 873; Ex parte Tokyo Marine & Fire Ins. Co., Ltd., 5 Cir., 1963, 322 F. 2d 113, the interlocutory certification method has many attractions in primary jurisdiction reference situations. Since the Court of Appeals must affirmatively allow a 1292(b) appeal, it affords a very early look-see as to whether in the given situation the primary reference order will ultimately be sustained in all likelihood.

[4] American Telephone and Telegraph Company, and the General Telephone Company of the Southwest.

The Carterphone, developed by the individual plaintiff Carter and manufactured and distributed by the corporate plaintiff, Carter Electronics, is a device for use with the traditional telephone handset. When in use, the telephone receiver handset is placed on a cradle which forms part of the Carterphone unit and by the process of induction, without any electrical connection or wiring or physical attachment, the Carterphone unit activates a two-way radio communication system to permit the telephone caller to converse with another person who may be located miles away from the telephone receiver handset. Similarly, the device works in the opposite direction to permit further transmission by land-lines of voice signals originating by mobile radio transmitter.

A substantial market throughout the United States has been developed competing in the product-relevant-market of the manufacture and sale of devices permitting private subscribers from regulated telephone companies to transmit telephone calls to and from points beyond the handset. Despite this economic demand the defendant Telephone Companies acting in concert with one or more or all of the named nonparties have taken concerted action to monopolize interstate commerce. These Telephone Companies sell and lease mobile radio-telephone units to their subscribers throughout the United States. These mobile units perform a function essentially similar to that afforded by the Carterphone and thus both are directly competitive. In violation of the antitrust laws, the Telephone Companies are undertaking to exclude the plaintiffs and other similar competitors from manufacturing or selling devices which would compete with Telephone Company-furnished mobile units.

To bring this about the Telephone Companies as sellers and lessors have required private subscribers, as buyers and lessees, not to deal with the Carterphone unit. Such

requirements, conditions and understandings constitute concerted action which have no reasonable purpose but which do have a damaging effect on competition. The Telephone Companies with the specific intent to restrain trade and commerce have deliberately and purposefully issued instructions to their agents and those of the nonparty Telephone Companies to forbid the use of the Carterphone device by their private subscriber customers. Each of the Telephone Companies, due to its size and economic resources, has both the power to control the prices of competitive communication devices and the power to exclude competitors. The Telephone Companies in conspiracy and combination with other as well as the named non-party companies have exercised their economic power within the relevant market to require their customers to refrain from purchasing or using the Carterphone.

At this point in the complaint, the plaintiffs, wisely we think, anticipated the matter of regulatory tariffs. They expressly allege in Paragraph XI that the Telephone Companies "in order to accomplish the violation of the federal antitrust laws heretofore set forth, have published a regulatory tariff which purports to prevent the use of a device similar to the Carterphone * * *. Such tariffs are similar or identical to * * * AT&T tariff FCC No. 132," a copy of which was annexed to the complaint "and incorporated herein."[5]

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[5] Tariff FCC No. 132:

"MESSAGE TOLL TELEPHONE SERVICE

"B. GENERAL REGULATIONS (Cont'd)

"7. *Unauthorized Attachments or Connections*

"No equipment, apparatus, circuit or device not furnished by the Telephone Company shall be attached to or connected with the facilities furnished by the Telephone Company, whether physically, by induction or otherwise, except as provided in this Tariff. In case any such unauthorized attachment or connection is made, the Telephone Com-

The plaintiffs then go on to allege that "although the Plaintiffs deny that such tariff is a valid tariff and that such tariff is applicable to the Carterphone, regardless of its validity and its application," the Telephone Companies "have, as a part of a common design and scheme, in uniformly publishing and enforcing such tariff, wrongfully used such tariff to accomplish a violation of the antitrust laws of the United States. Such tariff does not and may not authorize or excuse the aforementioned violation of the antitrust laws * * *."

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pany shall have the right to remove or disconnect the same; or to suspend the service during the continuance of said attachment or connection; or to terminate the service."

Though the tariff was amended in response to the Commission's order in Hush-A-Phone Corp. v. American Tel. & Tel. Co., No. 9189, FCC, Feb. 6, 1957, following the decision in Hush-A-Phone v. United States, D.C. Cir., 1956, 238 F. 2d 266, to permit the attachment of devices similar to the Hush-A-Phone for the convenience of the user, the prohibition on nonfurnished equipment such as the Carterphone was carried forward in the concluding paragraph of Section B. 24:

"Except as otherwise provided in this tariff, nothing herein shall be construed to permit the use of a recording device, or of a device to interconnect any line or channel of the Telephone Company with any other communications line or channel of the Company or of any other person."

See FCC Public Notice No. 57-518, May 15, 1957.

It rounds out the tariffese that the interconnection privileges "otherwise provided in this tariff" (§ B.24, supra) do not purport to touch the Carterphone or similar devices. Tariff FCC No. 132 sections which allow interconnections under certain conditions are as follows: § B.25 (connections with facilities of power, pipe line, and railroad companies pursuant to Tariff FCC No. 134); § B.26 (connections with experimental satellite facilities through connecting equipment provided by the telephone company); § B.27 (connection with N.A.S.A. installations pursuant to Tariff FCC No. 134); § B.28 (connections with certain facilities of the U. S. Army, Navy, and Air Force provided the appropriate Secretary of such Department certifies that connection is required by reasons of military necessity); § J (service through miscellaneous common carriers utilizing telephone company intraexchange equipment).

Then followed a brief description of the damage suffered because a large number of orders for Carterphones had been cancelled by customers and dealers due to the conduct of the Telephone Companies. The formal prayer for injunctive relief, broad and sweeping in its terms, would forbid enforcement or application of Tariff No. 132.[6]

On the basis of the complaint, tariffs, regulations, and agency orders of which it could take judicial knowledge,[7] the District Court held that "primary jurisdiction" is "vested in the" FCC "to resolve all questions relating to the justness, reasonableness, validity, and effect of the tariff and practices complained of." The Court accordingly stayed further proceedings but recognized "that jurisdiction remains in the Court to pass ultimately upon the antitrust issues."

III.

No matter from what vantage viewed, the conclusion is unerringly indicated that this was a case permitting, indeed requiring, primary jurisdiction reference to the FCC.

Our principal difficulty in the case comes from the fact, made quite clear in the probing from the bench, that we simply do not understand the theories the plaintiffs so earnestly press. We can accept their insistence that the

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[6] The prayer was for a permanent order "enjoining the defendants * * * from interfering with, harassing or preventing the sale and distribution of the Carterphone * * *" and "from threatening or intimidating any customer or prospective customer * * * with the curtailment * * * or removal of such customers' telephone service and from "directly or indirectly suggesting or advising the customers, prospective customers, and users of the Carterphone device that the use of such device may subject said persons * * * to any loss of * * * the telephone service provided by * * * [the telephone companies] * * *."

[7] Interstate Natural Gas Co. v. Southern Cal. Gas Co., 9 Cir., 1953, 209 F. 2d 380; Fletcher v. Jones, D.C. Cir., 1939, 105 F. 2d 58, cert. denied, 308 U.S. 555, 60 S. Ct. 116, 84 L. Ed. 467; Greeson v. Imperial Irr. Dist., 9 Cir., 1932, 59 F. 2d 529.

Telephone Companies read the complaint too narrowly in their argumentative effort to confine its total claim to Par. XI, see text accompanying note 5, *supra,* which affirmatively brings in and challenges AT&T Tariff FCC No. 132, note 5, *supra.* But both from the formal allegations of the complaint, and more so from a broader consideration of the very nature of the case,[8] the tariff is inescapably at the center of this controversy.

It is here that their position becomes an enigma wrapped in a mystery. After formally denying validity or inapplicability of Tariff No. 132 in Par. XI (note 5, *supra*), in a number of ways and at endless times throughout the briefs to us they assert that they "have not attacked the reasonableness or validity" of the tariff "as a regulatory measure," and they "are quite content to assume, for the purposes of this appeal, that the tariff is valid under agency standards, but" they add, "not under antitrust

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[8] The primary jurisdiction problem is not to be approached with any narrow, technical pleading point of view. As is well stated by McGovern, *Types of Questions Over Which Administrative Agencies Do Not Have Primary Jurisdiction,* 13 ABA, Antitrust Section 57, 66-67 (1958):

> "The doctrine of primary jurisdiction was not conceived as a shield to relieve regulated industries from all responsibility under the antitrust laws for their unlawful conduct. But neither does the addition of the epithet 'conspiracy' to an agreement for concerted activity approved by an agency automatically convert an otherwise lawful agreement into an unlawful contract and combination under the antitrust laws. The purpose of the doctrine of primary jurisdiction in this field is not merely to place a premium upon pleading skills but rather to evaluate whether the critical issues posed in the antitrust case actually fall within the policymaking competence of the regulatory agency."

Indeed, what was denominated a motion to dismiss because primary jurisdiction was in the FCC was, in effect, transmuted by the Court into a motion to require, and a stay pending, reference to the FCC. See 3 Davis, Administrative Law § 19.07, at 42-44 (1958 ed.).

standards."[9] Struggling as we do to divine their theory, we see two possibilities. The first is their repeated insistence that, as pleaded, this is a case of a concerted refusal to deal, and as such is a classic *per se* violation of the antitrust laws. The second, perhaps, is that this is an instance of the Arnall attack on the primary monopolistic purpose of an industry-wide adoption of a restrictive tariff. *Georgia* v. *Pennsylvania R.R.*, 1945, 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051. But neither of these, alone or together, rule out the tariff as a critical issue.

As to the first, the theory is really question-begging, for while concerted refusal to deal is a *per se* violation,[10] the extent and nature of the regulation of a regulated industry may make such concerted action legal.[11] *Keogh* v.

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[9] Appellants' Brief, p. 31.

[10] Appellants vigorously press: Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co., 1961, 364 U.S. 656, 81 S. Ct. 365, 5 L. Ed. 2d 358; Klors, Inc. v. Broadway Hale Stores, 1959, 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741; Eastern States Retail Lumber Dealers Ass'n v. United States, 1914, 234 U.S. 600, 34 S. Ct. 951, 58 L. Ed. 1490; Associated Press v. United States, 1945, 326 U.S. 1, 65 S. Ct. 1416, 89 L. Ed. 2013; Fashion Originators Guild of America v. FTC, 1941, 312 U.S. 457, 61 S. Ct. 703, 85 L. Ed. 949; affirming 2d Cir. 1940.

[11] In Silver v. New York Stock Exchange, 1963, 373 U.S. 341, 83 S. Ct. 1246, 10 L. Ed. 2d 389, the Supreme Court made this clear beyond doubt. First, the Court recognized that under the cases relied on by appellants here, see note 10, supra,

> "It is plain, to begin with, that removal of the wires by collective action of the Exchange and its members would, had it occurred in a context free from other federal regulation, constitute a per se violation of § 1 of the Sherman Act."

373 U.S. at 347, 83 S. Ct. at 1252, 10 L. Ed. 2d at 394, but the Court went on to state that "in this case, however, the presence of another statutory scheme, that of the Securities Exchange Act of 1934, means that such a conclusion is only the beginning, not the end, of inquiry," 373 U.S. at 349, 83 S. Ct. at 1252, 10 L. Ed. 2d at 395. Pinpointing the problem as being one of reconciling the aims of the antitrust laws with the policies of the Securities Exchange Act, after analyzing these policies the

Chicago & Northwestern Ry., 1922, 260 U.S. 156, 162, 43 S.Ct. 47, 49, 67 L.Ed. 183, 187. This contention in effect therefore anticipates the ultimate decision of the FCC[12]

Court found no legislative intention to immunize completely the exchange's actions from the operation of the antitrust laws. See note 25, infra. But the Court made clear that the absence of total immunity does not automatically mean that actions in a regulated industry are to be judged by per se standards in applying the antitrust laws:

> "But, under the aegis of the rule of reason, traditional antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate of the Securities Exchange Act. * * * Although * * * the statutory scheme of that Act is not sufficiently pervasive to create a total exemption from the antitrust laws, * * * it is also true that particular instances of exchange self-regulation which fall within the scope and purposes of the Securities Exchange Act may be regarded as justified in answer to the assertion of an antitrust claim."

373 U.S. at 360-61, 83 S. Ct. at 1259, 10 L. Ed. 2d at 402.

[12] When used throughout the expression FCC order, etc. refers to the first decision thereon after appropriate judicial review. There are two methods of obtaining judicial review of an FCC decision provided by the Communications Act, 47 USCA § 402. For reference to this special statutory review provision and for supplementary methods of review, see § 10(b) of the Administrative Procedure Act, 5 USCA § 1009(b). Under § 402 the method of review depends on the kind of decision sought to have reviewed. Decisions granting, denying, modifying, and revoking designated permits and licenses, and § 312 cease and desist orders are reviewable exclusively by the Court of Appeals for the District of Columbia. 47 USCA § 402(b). Proceedings seeking to enjoin, set aside, annul, or suspend any other orders of the FCC must be brought pursuant to the Administrative Orders Review Act of 1950 (Hobbs Act), 5 USCA § 1031 et seq., 47 USCA § 402(a), in the circuit where the petitioner resides or has its principal office or in the District of Columbia Circuit. 5 USCA § 1033. See generally 3 Davis, Administrative law § 23.03, at 305. It thus appears that judicial review of the FCC's determination of the validity and applicability of Tariff No. 132 would follow this second method. See, e.g., Hush-A-Phone v. United States, supra. Therefore, it is possible that the review of the FCC's determination and the review of the Antitrust Court's subsequent decision may be by different Courts of Appeals. This is to be contrasted to the situation where a Dis-

and later the Antitrust Court as to the validity and significance of the tariff.[13] The same is really true as to the second, since it is difficult to believe that the FCC, from the communication-utility-point of view, could uphold as "just and reasonable," 47 USCA § 201(b), 205, a tariff proved to have been brought into being by a concerted action whose aim was monopolistic, not the maintenance or improvement of telephone service.

The extravagant brandishing of antitrustees, the repitition of inflammatory epithets of combination, conspiracy, concerted action, monopolistic aim, the frequent incantation of the antitrust laws, and the fervent desire to keep the case for jury resolution in a Federal Court cannot either extinguish the Communications Act of 1934 or erase Tariff No. 132 as a significant, if not decisive, factor.

The starting point is the Communications Act of 1934, 47 USCA § 151 et seq. The National communications policy is broadly stated "to make available * * * to all the people of the United States a rapid, efficient, nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges * * *," 47 USCA § 151.

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trict Court refers a matter to the ICC under the primary jurisdiction doctrine. There the statute expressly provides that "the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend * * * any order * * * arising out of such referral." 28 USCA § 1336; see Agricultural Transp. Ass'n v. King, 5 Cir., 1965, 349 F. 2d 873, 885 n. 35.

[13] See 3 Davis, Administrative Law § 19.05, at 25:

"* * * [T]he problem is not one of application of the antitrust laws but is one of accommodation of the antitrust policy to the regulatory policy. * * * The courts are obviously well equipped to make initial decisions involving application of the antirust policy. But, before the particular regulatory agency has defined the particular regulatory policy in the particular case, the courts are not well equipped to make initial decisions involving accommodation of the antitrust policy to the regulatory policy."

The execution of the statutory scheme is committed to the FCC. And this structure, with infinite detail, undertakes to subject communication utilities to refined and comprehensive regulation.

To achieve these goals, the Communications Act grants a broad range of powers to the Federal Communications Commission. 47 USCA §§ 201-222. The Commission has the power to require a telephone company to furnish "service upon reasonable request therefor," and, where the Commission "finds such action necessary or desirable in the public interest," to require interconnection with other carriers at rates set by the Commission after opportunity for hearing. 47 USCA § 201(a). "All charges, practices, classifications, and regulations" of telephone companies "shall be just and reasonable;" "unjust or unreasonable" charges are unlawful, 47 USCA § 201(b). The Commission has the power to prescribe such rules and regulations as are "necessary in the public interest" to carry out the provisions of the Act. 47 USCA § 201(b). To this end, the Commission has promulgated 493 pages of regulations governing the common carrier services provided by telephone companies. 47 C.F.R., Parts 20-69. It is unlawful for a telephone company to discriminate in any "unjust or unreasonable" manner in its "charges, practices, classifications, regulations, facilities, or services." 47 USCA § 202(a). Each telephone company is required to file with the Commission, and keep open for public inspection, tariffs setting forth its charges, classifications, regulations, and practices. 47 USCA § 203(a). Such tariffs must be followed until such time as they are amended in the manner provided by the statute. 47 USCA § 203(b). A telephone company may not provide service unless tariffs are filed covering such service and the company may not deviate from the rates, classifica-

tions, regulations or practices contained in the tariffs so filed. 47 USCA § 203(c).

The FCC has the power and duty to examine all tariffs filed and may either on complaint or on its own initiative determine and prescribe what charges, classifications, regulations, and practices are "just, fair, and reasonable" and are to be thereafter followed by the telephone company in question. 47 USCA § 205(a). The Commission is given extensive power to assess the value of the facilities of telephone companies. 47 USCA § 213. The Commission has the power to order a telephone company to provide additional facilities for the performance of its duties as a public utility, if such addition is "in the interest of public convenience and necessity" or "the expense involved therein will not impair the ability of the carrier to perform its duty to the public." 47 USCA § 214(d). However, a carrier does not have the right to extend its lines unless the Commission authorizes it to do so by the issuance of a certificate of public convenience and necessity. 47 USCA § 214(a). The Commission has power to examine transactions entered into by any common carrier which may affect the carrier's charges or services. 47 USCA § 215(a). The Commission has the specific duty to keep informed as to "technical developments and improvements in wire and radio communication * * * to the end that the benefit of new inventions and developments may be made available to the people of the United States." 47 USCA § 218.

Against this intricate statutory structure in which scarcely a single business act is free from continuous regulation or at least administrative governmental review, one thing emerges clearly. It is that Tariff No. 132, its meaning, its scope, its applicability, its validity for any or all governmental purposes, is ever-present. The best illustration is to accept momentarily the concession[14] of appellants that

the tariff is authoritatively held to be valid administratively for regulatory purposes, to which they add, but not valid for antitrust purposes. We can recognize, of course, that in this sometime weird antitrust world, in which antitrust policies appear to have an overpowering influence in the running clash between supposedly coordinate executive agencies or departments of the same Government, *cf. California* v. *FPC*, 1962, 369 U.S. 482, 82 S. Ct. 901, 8 L. Ed. 2d 54, it is possible for the Courts to hold finally that this result could occur. But that choice ought not to be made, the occasion for facing such a possibility ought not to be forced until it is inescapably necessary. The very difficulties inherent in that prospect demonstrate that.

On any such hypothesis, of course, a significant thing will be the FCC determination of the validity of Tariff No. 132. If, as the law clearly permits,[15] the monopolistic and antitrust implications of the practices compelled by

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[14] Appellants do not make this as an *arguendo* assumption. On their thesis they accept it as valid for so-called "administrative" regulatory purposes.

[15] Under statutory rate and practice standards of "just and reasonable," many technical and administrative factors are involved in the light of the industry being regulated. Some of the factors, many complex and highly technical, as we advance in the electronic age, concerning maintenance and upkeep of non-furnished equipment with resulting deterioration of high quality service for both incoming and outgoing calls, are illustrated in several cases. See, e.g., Peters Sunset Beach, Inc. v. Northwestern Bell Tel. Co., Minn. R.R. & Warehouse Comm'n, 1965, 60 P.U.R. 3d 363; City of Los Angeles v. Southern Cal. Tel. Co., Cal. R.R. Comm'n, 1933, 2 P.U.R. (NS) 247; In the Matter of AT&T & Western Union Tel. Co., F.C.C., 1948, Docket No. 8963. One of the factors, especially where, as here, the matter is precipitated by antitrust claims, is the propriety, if not the duty, of the administrative agency to consider monopolistic and antitrust implications. The Supreme Court has made this clear. In United States v. Radio Corp. of America, 1959, 358

the tariff were among the factors considered and evaluated by the FCC, a Court would be hard put in either contriving or thereafter verbalizing a concept which, in a sort of now-you-see-it, now-you-don't sleight of hand, would allow the tariff to be valid and yet invalid at one and the same time.[16]

U.S. 334, 348, 79 S.Ct. 457, 466 3 L. Ed. 2d 354, 364, the Court said:

> "Accordingly, this Court consistently held that when rates and practices relating thereto were challenged under the antitrust laws, the agencies had primary jurisdiction to consider the reasonableness of such rates and practices in the light of the many relevant factors including alleged antitrust violations, for otherwise sporadic action by federal courts would disrupt an agency's delicate regulatory scheme, and would throw existing rate structures out of balance."

Even more pointed is the holding in McLean Trucking Co. v. United States, 1944, 321 U.S. 67, 80, 64 S. Ct. 370, 377, 88 L. Ed. 544, 553, where the Court held:

> "But in executing those policies [of the transportation Act committed directly to the ICC] the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true, it cannot, without more, ignore the latter. The precise adjustments which it must make, however, will vary from instance to instance depending on the extent to which Congress indicates a desire to have those policies leavened or implemented in the enforcement of the various specific provisions of the legislation with which the Commission is primarily and directly concerned."

See also FCC v. RCA Communications, Inc., 1953, 346 U.S. 86, 73 S.Ct. 998, 97 L. Ed. 1470; City of Pittsburgh v. FPC, D.C. Cir., 1956, 237 F. 2d. 741, 754.

[16] Cf. Pan American Airways v. United States, 1963, 371 U.S. 296, 309, 83 S.Ct. 476, 484, 9 L. Ed. 2d 325, 335:

> "It would be strange, indeed, if a division of territories or an allocation of routes which met the requirements of the 'public interest' as defined in § 2 were held to be antitrust violations. It would also be odd to conclude that an affiliation between a common carrier and an air carrier that passed muster under § 408 should run afoul of the antitrust laws."

Despite the disparagement of plaintiffs that the tariff is initially the handwork of the Telephone Companies' scriveners and is, at any event, not a rate but a mere equipment tariff, two things are positive. First, a tariff, required by law to be filed, is not a mere contract. It is the law. *Compania Anonima Venezolana De Navegacion* v. *A. J. Perez Export Co.*, 5 Cir., 1962, 303 F. 2d 692, 696 & n. 12, cert. denied, 371 U.S. 942, 83 S. Ct. 321, 9 L. Ed. 2d 276; *United States* v. *Associated Air Transp. Inc.*, 5 Cir., 1960, 275 F. 2d 827, 833. Second, the telephone utility is required to file in its schedules and tariffs "the classifications, practices, and regulations affecting such charges," 47 USCA § 203(a). The "classifications, practices, and regulations," as well as the charges, must be "just and reasonable." 47 USCA § 201(b). The Commission is empowered to determine whether they are and its power extends to determining "what classification, regulation, or practice is or will be just, fair, and reasonable." 47 USCA § 205(a). The "* * * Commission's range of power over the regulated companies" extends to "* * * 'charges, practices * * *'" and is not limited to rates and * * * services." *Ambassador, Inc.* v. *United States*, 1945, 325 U.S. 317, 323, 65 S. Ct. 1151, 1154, 89 L. Ed. 1637, 1642. Considering that so long as the tariff is "administratively" valid and applicable — as is assumed — the Telephone Company not only may, but must, enforce it uniformly as to all similarly situated, to permit the Antitrust Court to declare it invalid would be putting judicial imprimatur on operational chaos. It would require in effect that the Telephone Company disconnect service to those using Carterphones but who do not sue, while continuing service to those who sue. Worse, ratepayers, including those coerced under the operative effect of the tariff to discontinue Carterphone, would bear their proportionate part of the amount of triple damages and attorneys' fees paid out to the success-

ful antitrust suing customer.[17] That chaos, of course, could be eliminated by the Antitrust Court holding that despite earlier FCC approval of the tariff, the monopolistic implications are so great that it cannot stand for any purpose. This, in effect, would be a first, second, or third tier re-review[18] of an already reviewed administrative decision.[19] The likelihood of this occurring is remote enough to say that the prospect ought not to be anticipated.

There is, thus, the strong possibility that all, or a principal part, of the antitrust suit will effectually be determined by the resolution by the FCC of the validity and application of the tariff to Carterphone. This is not to say, as the appellants' briefs contend, that contrary to *United States* v. *Radio Corp. of America, supra,* 358 U.S. at 343-46, 79 S. Ct. at 463-465, 3 L. Ed. 2d at 361-62; *California* v. *FPC, supra; United States* v. *Philadelphia Nat'l Bank, supra,* 374 U.S. at 350-54, 83 S. Ct. 1715 at 1734-1737, 10 L. Ed. 2d at 937-39; and *Silver* v. *New York Stock Exchange, supra,* the Communications Act of 1934 either confers immunity on telephone companies or commits to the FCC the determination of antitrust issues as

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[17] See generally von Mehren *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction,* 67 Harv. L. Rev. 929 (1954), who concludes:

> "The doctrine of primary jurisdiction is essential to effective regulation. Without it members of regulated industries would be subject to the commands of two masters — the regulatory statute as administered by the agency and the antitrust laws as administered by the courts. * * * It is nothing* more than a procedural device to secure preliminary administrative determinations of regulatory matters."

Id. at 965-66

*We would add this caveat: "Nothing" is a very very positive word, perhaps too much so.

[18] First tier, the District Court trying the antitrust suit; second tier, the Court of Appeals reviewing that decision; third tier, the Supreme Court.

[19] See note 12, supra.

such. What we do say is that inescapably presented is the question whether the practice permitted, indeed required, by Tariff No. 132 is lawful. If it is legal, and if it must be applied to all alike, then surely a significant issue having important, if not decisive, impact on the outcome of the antitrust litigation has been excised.

That this is a role of primary jurisdiction reference is demonstrated by assuming the success of the present appeal, our reversal of the stay pending reference and the immediate trial of the antitrust suit. Bypassing the difficult problems of what treatment, if any, the trial Judge would give to Tariff 132 either in the admission of evidence or jury instructions,[20] how would the validity and application of the tariff ever be effectively determined by the FCC with respect to this particular antitrust case and the assumed judgment for triple damages? In the face of the Seventh Amendment, could the District Court after jury trial and verdict then make a reference? Could the Court of Appeals?

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[20] In the District Judge's memorandum opinion, he stated:

> "Determinations that regulatory tariffs are just, reasonable and valid permeate every aspect of telephone communications regulation. * * * The antitrust laws and the precise ingredients of this case are among the relevant factors for FCC consideration in determining the justness, reasonableness, validity, application and effect of the tariff and practices here involved."

This is not, as supposed from some of the Judge's comments during colloquy or as asserted in appellant's brief, to be read as a predetermination that the FCC either would or could or should evaluate this in the traditional antitrust Sherman Act "rule of reason" concept, see FCC v. RCA Communications, Inc., supra; McLean Trucking Co. v. United States, supra, or that the question of reasonableness is even open for inquiry in the per se case, see note 10, supra; *but see* note 11, supra. The regulatory statutory standard of "just and reasonable" reflects many factors, including antitrust implications. See note 15, supra.

The Supreme Court?[21] If referred at that late stage what record would the FCC consider? The one hammered out under the narrow rules of episodic civil trial? A broad industry-wide survey with full administrative exploration of the scientific and technical problems? Assuming the ultimate FCC determination thereafter of applicability and validity, how or in what manner could this be applied to penetrate the foggy mystery of the jury's general verdict? To these questions we do not even begin to suggest an answer. Nor do the plaintiffs. They simply ignore them on the simple, but natural, desire that, through the incantation of these magic antitrust epithets, these serious problems about Tariff No. 132 and its effective enforcement will somehow go away.

Embracing fully and enthusiastically the proposition that "no fixed formula exists for applying the doctrine of primary jurisdiction" and that in "every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation,"[22] this Court has given full voice to this device. And in nearly every instance where we order it, it ought first to have been ordered by the trial Court. Thus, contrary to the suggestion of appellants that as Judges we are in as good a position to read Tariff No. 132 as the FCC, we sent a tariff construction problem to the ICC in *Louisville & N.R.R.* v. *Knox Homes Corp.*, 5 Cir., 1965, 343 F. 2d 887. There it was

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[21] Cf. Clay v. Sun Ins. Office, Ltd., 1960, 363 U.S. 207, 80 S. Ct. 1222, 4 L. Ed. 2d 1170, on certification upon remand, Fla., 1961, 133 So. 2d 735, on receipt of answers to certification, 5 Cir., 1963, 319 F. 2d 505, rev'd, 1964, 377 U.S. 179, 84 S. Ct. 1197, 12 L. Ed. 2d 229; Hopkins v. Lockheed Aircraft Corp., 5 Cir., 1966, 358 F. 2d 347.

[22] United States v. Western Pac. RR., 1956, 352 U.S. 59, 64, 77 S. Ct. 161, 165, 1 L. Ed. 2d 126, 132.

tariffese which created the problem. Here it is largely technological consideration as to the equipment, apparatus, etc., reasonably within the tariff's description. In *River Terminals Corp.* v. *Southwestern Sugar & Molasses Co.*, 5 Cir., 1958, 253 F. 2d 922, aff'd, 1959, 360 U.S. 411, 79 S. Ct. 1210, 3 L. Ed. 2d 1334, we ordered reference to the ICC of a serious problem of law under published tariffs. And in *Agricultural Transp. Ass'n* v. *King*, 5 Cir., 1965, 349 F. 2d 873, we sent to the ICC for initial determination the serious and far-reaching question of law concerning the interpretation and application of the Transportation Act and the interplay of the Agricultural Marketing Act, 12 USCA § 1141.

The brief analysis which we have made demonstrates convincingly that the construction, application, and validity of Tariff No. 132 is a critical, if not decisive, issue. As in many other antitrust or similar cases, primary jurisdiction reference was imperatively called for.[23] *Far East Conference* v. *United States*, 1952, 342 U.S. 570, 72 S. Ct. 492, 96 L. Ed. 576; *United States Nav. Co.* v. *Cunard S.S. Co.*, 1932, 284 U.S. 474, 52 S. Ct. 247, 76 L. Ed. 408; *Pan American World Airways, Inc.* v. *United States*, 1963, 371 U.S. 296, 83 S. Ct. 476, 9 L. Ed. 2d 325; *Carnation Co.* v. *Pacific*

[23] Indeed, the Telephone Companies have referred us to at least four cases in which the precise relationship of the antitrust laws to the jurisdiction of the FCC has been considered by District Courts. Marcom, Inc. v. American Tel. & Tel. Co., No. 43215, N.D. Cal., July 28, 1965, Western States Tel. Co. v. American Tel. & Tel. Co., No. 64-175-PH, S.D. Cal., July 28, 1964; Secrafone v. Illinois Bell Tel. Co., Civ. No. 60C-1022; N.D. Ill., 1961; Pastor v. American Tel. & Tel. Co., S.D.N.Y., 1940, 76 F. Supp. 781. In each case it was alleged that the actions of the defendant telephone companies, taken in accordance with their foreign attachment and interconnection tariffs, had prevented the plaintiffs from marketing their various devices designed for attachment to or interconnection with the channels of the defendants, and that such actions thus violated the antitrust laws. In each case it was held that primary jurisdiction lay in the FCC and appropriate state commissions.

Westbound Conference, 1966, 383 U.S. 213, 86 S. Ct. 781, 15 L. Ed. 2d 709, as amended, 383 U.S. 213, 86 S. Ct. 781, 15 L. Ed. 2d 851. Although *United States* v. *Radio Corp. of America, supra*, stands for the proposition that there is no necessity to invoke the primary jurisdiction of the FCC in an antitrust suit challenging a television acquisition,[24] the Court, contrasting television with the "pervasive regulatory scheme" prescribed in the Communications Act for telephone and telegraph companies, fully recognized that where tariff structures might be thrown "out of balance" and "sporadic action by federal courts" might "work * * * mischief," 358 U.S. at 350, 79 S. Ct. at 467, 3 L. Ed. 2d at 365, primary jurisdiction is available. So did the Court in *Silver* v. *New York Stock Exchange*, 1963, 373 U.S. 341, 83 S. Ct. 1246, 10 L. Ed. 2d 389.[25] That the ultimate decision

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[24] Although this proposition is certainly laid down, it was unnecessary to the holding of the Court since the FCC had already approved the acquisition and there was nothing left for the Court but the task of accommodating the policies of the Communications Act to the aims of the antitrust laws. The Court indeed undertook this task, held that the approval of the FCC did not immunize the acquisition from the antitrust laws, and could have disposed of the case solely on this ground. See 3 Davis, Administrative Law § 19.06, at 16 (1965 Supp.). This is precisely what the Court did in United States v. Philadelphia Nat'l Bank, supra. Assuming, but expressly not deciding, 374 U.S. at 353 n. 32, 83 S. Ct. at . . . . n. 32, 10 L. Ed. at 939 n. 32, "the applicability of the doctrine [of primary jurisdiction] to merger-application proceedings before the banking agencies," the Court noted that "the present action would not be barred, for the agency proceeding was completed before the antitrust action was commenced," 374 U.S. at 353, 83 S. Ct. at 1736 n. 32 10 L. Ed. 2d at 939, and disposed of the case on the ground that the Comptroller's approval of the bank merger did not immunize the transaction from the operation of the antitrust laws.

[25] In *Silver*, the Court held that "the Commission's lack of jurisdiction over particular applications of exchange rules means that the question of antitrust exemption does not involve any problem of conflict or coextensiveness of coverage with the agency's regulatory power," and noted that "this aspect of

of the FCC may not be an end to the matter is neither unexpected nor decisive. For the doctrine applies "even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined." *Far East Conference* v. *United States,* 1952, 342 U.S. 570, 574, 72 S. Ct. 492, 494, 96 L. Ed. 576, 582. Nor is it "even if the court thinks that the arrangement alleged to violate the antitrust laws cannot be legally approved by the agency" for "the court should still allow the agency first to pass upon the question." 3 Davis Administrative Law § 19.07, at 40 (1958). Nor is a reference a prejudgment that the regulatory act or agency offers antitrust immunity as such for "reference to an administrative agency is not restricted to situations when the

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the statute * * * obviates any need to consider whether petitioners were required to resort to the Commission for relief before coming into Court," 373 U.S. at 358 & n. 12, 360, 83 S. Ct. at 1247 & n. 12, 1258, 10 L. Ed. 2d at 400 & n. 12, 402. Pursuing this further, the Court noted that "there is nothing built into the regulatory scheme which performs the antitrust function of insuring that an exchange will not in some cases apply its rule so as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends," and recognized in footnote 12 that "should review of exchange self-regulation be provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would be presented." *Ibid.* Here, to the contrary, not only can the parties resort to the FCC for a determination of whether the "practice" of the telephone companies pursuant to Tariff No. 132 is "just and reasonable," 47 USCA § 205, with a right to have this determination reviewed in the appropriate Court of Appeals, see note 12, supra, but that determination must certainly include consideration of antitrust policies, see note 15, supra. These differences from the SEC scheme there in issue require that the Antitrust Court not decide this question until the FCC's determination makes it necessary, and then with the guidance of the FCC's resolution of the technical problem involved.

agency has the power to immunize."[26] *Maddock & Miller, Inc.* v. *United States Lines*, 2 Cir., 1966, 365 F. 2d 98.

In affirming this primary jurisdiction reference to the FCC,[27] we must sound to all hands this caveat. In analyzing the contentions pro and con in the quest for seeking and identifying critical issues for initial administrative determination, nothing we have said or left unsaid, nothing expressed or implied, is to be considered as even a remote possible whisper of a suggestion as to how any one or more or all of the issues now disclosed or hereafter revealed are ultimately to be decided. All of those decisions are to be made first by the trial Judge when and after the primary jurisdiction reference has been concluded.

AFFIRMED.

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[26] Contrary to appellants' contention, the trial Judge did not directly or impliedly pass on the question of immunity. This and all other questions were deferred pending reference to the FCC.

[27] While the effect of the order of reference is to impose on the appellants the burden of filing a complaint with the Commission, 47 USCA § 208; 47 CFR §§ 1.701-735, the obligation to institute and prosecute such reference in good faith rests equally on the Telephone Companies as a condition to the continuation of the stay order. The Commission can on its own initiative order an investigation on whether a particular practice is "just and reasonable" and thereupon issue a cease and desist order, 47 USCA § 205(a). More significant it may, in accordance with § 5(d) of the APA, 5 USCA § 1004(d), "on motion or its own motion issue a declaratory ruling terminating a controversy or removing uncertainty." 47 CFR § 1.2. We again emphasize that nothing we have said here is intended to limit the manner in which the referred question (and all matters related thereto) are to be presented to the Commission, blueprint the type of proceeding to be followed by the Commission, limit the scope of the Commission's inquiry, delineate the factors to be considered by the Commission, or indicate the conclusion to be reached by either the Commission or the District Court after the former has acted.

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APPENDIX C

1. Communications Act of 1934, 47 U.S.C. § 151, 201-222

§ 151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter. June 19, 1934, c. 652, Title I; § 1, 48 Stat. 1064; May 20, 1937, c. 229, § 1, 50 Stat. 189.

SUBCHAPTER II. COMMON CARRIERS

§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes

and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided,* That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further,* That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further,* That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter. June 19, 1934, c. 652, Title II § 201, 48 Stat. 1070; May 31, 1938, c. 296, 52 Stat. 588.

§ 202. Discriminations and preferences

(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services, whenever referred to in this chapter include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $500 for each such offense and $25 for each and every day of the continuance of such offense. June 19, 1934, c. 652, Title II, § 202, 48 Stat. 1070; Sept. 13, 1960, Pub. L. 86—751, 74 Stat. 888.

§ 203. Schedules of charges; filing with Commission; changes in schedules; overcharges and rebates; penalty for violations

(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or

points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

(c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or

(3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $500 for each such offense, and $25 for each and every day of the continuance of such offense. June 19, 1934, c. 652, Title II, § 203, 48 Stat. 1070.

§ 204. Hearings on new charges; suspension pending hearing; refunds

Whenever there is filed with the Commission any new charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, but not for a longer period than three months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made

within the period of the suspension, the proposed change of charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, after the organization of the Commission, the burden of proof to show that the increased charge, or proposed increased charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. June 19, 1934, c. 652, Title II, § 204, 48 Stat. 1071.

§ 205. Commission authorized to prescribe just and reasonable charges; penalties for violations

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what clas-

sification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $1,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense. June 19, 1934, c. 652, Title II, § 205, 48 Stat. 1072.

§ 206. Carriers' liability for damages

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case. June 19, 1934, c. 652, Title II, § 206, 48 Stat. 1072.

§ 207. Recovery of damages

Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies. June 19, 1934, c. 652, Title II, § 207, 48 Stat. 1073.

§ 208. Complaints to Commission; investigations

Any person, any body politic or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. June 19, 1934, c. 652, Title II, § 208, 48 Stat. 1073.

§ 209. Orders for payment of money

If, after hearing on a complaint, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named. June 19, 1934, c. 652, Title II, § 209, 48 Stat. 1073.

§ 210. Franks and passes; free service to governmental agencies in connection with national defense

LAWYER'S NOTE

[While part of the comprehensive regulatory scheme that the telephone companies are subject to, the text of this section is omitted because not directly involved in the instant case.]

§ 211. Contracts of carriers; filing with Commission

(a) Every carrier subject to this chapter shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this chapter, in relation to any traffic affected by the provisions of this chapter to which it may be a party.

(b) The Commission shall have authority to require the filing of any other contracts of any carrier, and shall also have authority to exempt any carrier from submitting copies of such minor contracts as the Commission may determine. June 19, 1934, c. 652, Title II, § 211, 48 Stat. 1073.

§ 212. Interlocking directorates; officials dealing in securities

LAWYER'S NOTE

[While part of the comprehensive regulatory scheme that the telephone companies are subject to, the text of this section is omitted because not directly involved in the instant case.]

§ 213. Valuation of property of carrier

LAWYER'S NOTE

[While part of the comprehensive regulatory scheme that the telephone companies are subject to, the text of this section is omitted because not directly involved in the instant case.]

§ 214. Extension of lines; certificate of public convenience and necessity; discontinuance of service

(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided,* That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this title: *Provided further,* That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment

of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however,* That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

(b) Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given to, and shall cause a copy of such application to be filed with, the Secretary of the Army, the Secretary of the Navy, and the Governor of each State in which such line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction, or impairment of service is proposed, with the right to those notified to be heard; and the Commission may require such published notice as it shall determine.

(c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with

the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

(d) The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses or neglects to comply with any order of the Commission made in pursuance of this subsection shall forfeit to the United States $100 for each day during which such refusal or neglect continues. June 19, 1934, c. 652, Title II, § 214, 48 Stat. 1075; Mar. 6, 1943, c. 10, §§ 2-5, 57 Stat. 11.

§ 215. Services, equipment, etc.; examination of transactions by Commission

LAWYER'S NOTE

[While part of the comprehensive regulatory scheme that the telephone companies are subject to, the text of this section is omitted because not directly involved in the instant case.]

§ 216. Receivers and trustees; application of chapter

LAWYER'S NOTE

[While part of the comprehensive regulatory scheme that the telephone companies are subject to, the text of this section is omitted because not directly involved in the instant case.]

§ 217. Agents' acts and omissions; liability of carrier

LAWYER'S NOTE

[While part of the comprehensive regulatory scheme that the telephone companies are subject to, the text of this section is omitted because not directly involved in the instant case.]

§ 218. Management of business; inquiries by Commission

The Commission may inquire into the management of the business of all carriers subject to this chapter, and shall keep itself informed as to the manner and method in which the same is conducted and as to technical developments and improvements in wire and radio communication and radio transmission of energy to the end that the benefits of new inventions and developments may be made available to the people of the United States. The Commission may obtain from such carriers and from persons directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created. June 19, 1934, c. 652, Title II, § 218, 48 Stat. 1077.

§ 219. Reports by carriers; contents and requirements generally

LAWYER'S NOTE

[While part of the comprehensive regulatory scheme that the telephone companies are subject to, the text of this section is omitted because not directly involved in the instant case.]

§ 220. Accounts, records, and memoranda; depreciation charges; forfeitures and penalties

LAWYER'S NOTE

[While part of the comprehensive regulatory scheme that the telephone companies are subject to, the text of this section is omitted because not directly involved in the instant case.]

§ 221. Telephone companies; consolidation; state jurisdiction over services, charges, etc., unaffected; determination of property used in interstate toll service; valuation

LAWYER'S NOTE

[While part of the comprehensive regulatory scheme that the telephone companies are subject to, the text of this section is omitted because not directly involved in the instant case.]

§ 222. Consolidations and mergers of telegraph carriers — Definitions

LAWYER'S NOTE

[While part of the comprehensive regulatory scheme that the telephone companies are subject to, the text of this section is omitted because not directly involved in the instant case.]

2. Sherman Act, §§ 1 and 2, 15 U.S.C. §§ 1 and 2

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade of commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same gen-

eral class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

§ 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July

2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

3. Clayton Act, §§ 3, 4, and 16, 15 U.S.C. §§ 14, 15, and 26

§ 14. Sale, etc., on agreement not to use goods of competitor

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Oct. 15, 1914, c. 323, § 3, 38, Stat. 731.

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

§ 26. Injunctive relief for private parties; exception

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. Oct. 15, 1914, c. 323, § 16, 38 Stat. 737.

4. 28 U.S.C. § 1292(a)(1)

§ 1292. Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing

or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

APPENDIX D

TARIFF F.C.C. NO. 132

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY
LONG LINES DEPARTMENT

MESSAGE TOLL TELEPHONE SERVICE

B. GENERAL REGULATIONS (Cont'd)

7. Unauthorized Attachments or Connections

No equipment, apparatus, circuit or device not furnished by the Telephone Company shall be attached to or connected with the facilities furnished by the Telephone Company, whether physically, by induction or otherwise, except as provided in this Tariff. In case any such unauthorized attachment or connection is made, the Telephone Company shall have the right to remove or disconnect the same; or to suspend the service during the continuance of said attachment or connection; or to terminate the service.

24. Miscellaneous Devices Provided by the Customer

(Filed in compliance with Federal Communications Commission order dated February 6, 1957, in Docket No. 9189)

The provisions of Paragraph 7. preceding shall not be construed or applied to bar a customer from using devices which serve his convenience in his use of the facilities of the Telephone Company in the service for which they are furnished under this tariff, provided any such device so used would not endanger the safety of Telephone Company employees or the public; damage, require change

in or alteration of, or involve direct electrical connection to, the equipment or other facilities of the Telephone Company; or interfere with the proper functioning of such equipment or facilities; or impair the operation of the telephone system or otherwise injure the public in its use of the Telephone Company's services.

Except as otherwise provided in this tariff, nothing herein shall be construed to permit the use of a recording device, or of a device to interconnect any line or channel of the Telephone Company with any other communications line or channel of the Company or of any other person.

25. Connections with Certain Facilities of Power, Pipe Line and Railroad Companies

Telephone facilities of an electric power company or oil, oil products or natural gas pipe line company, or railroad company, provided primarily to communicate with points located along a right-of-way (including premises of such company anywhere in cities, towns or villages along the right-of-way) owned or controlled by such company and extending between or beyond exchange areas of the Telephone Company, will be connected with Message Toll Telephone Service furnished by the Telephone Company subject to the regulations and conditions stated in Tariff F.C.C. No. 134 of this Company, and amendments thereto and successive issues thereof, for connection of such facilities to Telephone Company private line services and channels.

26. Connection to Experimental Satellite Facilities

Message toll telephone service may be connected through suitable connecting equipment provided by the Telephone Company to ground stations for transmission to or from experimental satellites.

27. Connections with Certain Facilities of the National Aeronautics and Space Administration

Telephone facilities of the National Aeronautics and Space Administration will be connected with Message Toll Telephone Service furnished by the Telephone Company subject to the regulations and conditions stated in Tariff F.C.C. No. 134 of this Company, and amendments thereto and successive issues thereof, for connection of such facilities to Telephone Company private line services and channels.

28. Connections with Certain Facilities of the U.S. Army, Navy and Air Force

a. Facilities of a telephone system of the U.S. Department of the Army, Navy or Air Force which serves an establishment operated and administered under the direction of the Department and commanded by authorities of such Department, and which is located generally within the boundaries of such establishment, will be connected with Message Toll Telephone Service furnished by the Telephone Company where the Secretary of the Department certifies in writing that reasons of military necessity require that the establishment be served by a telephone system of the Department. In addition, the facilities of a temporary telephone

system of such Department located off a permanent establishment of the Department for maneuvers, mobilization tests or technical service tests will be so connected.

b. Telephone facilities of the U.S. Department of the Army, Navy or Air Force, other than those described in a. above, will be connected by means of switching or connecting equipment furnished by the Telephone Company, to a private branch exchange switchboard or other telephone switching or terminal equipment of the Telephone Company, for communication with stations and private line facilities associated with said switching or terminal equipment, where the Secretary of the Department or his authorized representative notifies the Telephone Company in writing that such connection is required for reasons of military necessity. Such Department telephone facilities will be connected with Message Toll Telephone Service furnished by the Telephone Company only in cases of emergency involving safety of life or property, unless the aforesaid Department facilities are in locations where it is impracticable for the Telephone Company to furnish its facilities.

J. SERVICE THROUGH MISCELLANEOUS COMMON CARRIERS (as defined in Part 21 of the F.C.C. rules)

Service is available to and from customers of the miscellaneous common carriers listed below through intra-exchange connecting facilities provided by the Telephone Company.

The rates between the applicable wire telephone rate center and the rate center of the common carrier listed below are the rates set forth in C. and D. of this tariff. An additional charge, which the miscellaneous common carrier bills to and collects from its customer, is applicable to the remainder of the haul, as set forth in 1. following or in the tariff indicated in 2. following.

LAWYER'S NOTE:

[Section J then lists by name 114 miscellaneous common carriers to whose customers the Telephone Company provides service through intraexchange connecting facilities — these MCC's are not here set forth but may be found at pages 105-109 of the Record.]

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APPENDIX E

FCC 66-924
89476

Before the

Federal Communications Commission

Washington, D. C. 20554

Docket No. 16942

In the Matter of
Use of the Carterphone Device in
Message Toll Telephone Service

ORDER

By the Commission:

At a session of the Federal Communications Commission held at its offices in Washington, D. C., on the 20th day of October 1966;

The Commission having under consideration the decision of the United States Court of Appeals for the Fifth Circuit in *Carter, et al.* v. *American Telephone and Telegraph Co., et al.* (No. 23556, Slip Opinion, August 17, 1966) and the regulations published in American Telephone and Telegraph Company Tariff F.C.C. No. 132 (Message Toll Telephone Service) which purport to govern the extent to which telephone users may attach or connect devices to the facilities of the operating telephone companies for use in interstate or foreign message toll telephone service:

IT APPEARING, That the Court, in the above-referred to decision affirmed a February 8, 1966, decision by the United States District Court for the Northern District of

Texas, Dallas Division, wherein the District Court, in a private antitrust action for triple damages and injunctive relief filed by Thomas F. Carter and Carter Electronics Corporation against American Telephone and Telegraph Co. and the General Telephone Company of the Southwest, invoked the doctrine of primary jurisdiction and referred to this Commission for resolution, the question of the justness, reasonableness, validity and effect of the tariff regulations and practices complained of in the aforesaid action and wherein the said District Court stayed the proceedings in the aforesaid action pending the conclusion of appropriate administrative proceedings initiated before the Commission, *Carter, et al.* v. *American Telephone and Telegraph Co., et al.,* (Memorandum Order filed February 8, 1966, Civil Action No. 3-1294).

IT IS ORDERED, That, pursuant to the provision of Sections 201, 202, 205, 403 and 411 of the Communications Act of 1934, as amended, a public hearing shall be held at a time and place to be hereinafter designated upon the following specific issues:

ISSUES

1. The nature and extent of the public need and demand for the use of the Carterphone device in connection with interstate or foreign message toll telephone service;

2. The effect of the use of the Carterphone device upon the operation of the telephone system used to provide interstate and foreign telephone message toll telephone services to the public or upon the employees and facilities of the telephone companies providing such services or upon the public in its use of such telephone system;

3. Whether the provisions of Tariff F.C.C. No. 132 filed by American Telephone and Telegraph Company may

properly be construed to prohibit any telephone user from attaching the Carterphone device to the facilities of the telephone companies for use in connection with interstate and foreign message toll telephone services;

4. If the aforesaid tariff provisions may properly be construed to prohibit any telephone user from attaching the Carterphone device to the facilities of the telephone companies for use in connection with interstate or foreign message toll telephone services:

(a) Whether such regulations are, or will be, unjust and unreasonable and, therefore, unlawful within the meaning of Section 201(b) of the Communications Act of 1934, as amended, or are, or will be, unduly discriminatory or preferential in violation of Section 202(a) of said Act;

(b) Whether, in the light of facts developed in connection with the foregoing issues, the Commission, in accordance with the provisions of Section 205 of the Act, should prescribe tariff regulations which will permit the use of the Carterphone device in connection with interstate and foreign message toll telephone service and, if so, the kind of tariff regulation which should be so prescribed;

5. If the aforesaid tariff regulations of the telephone companies may not properly be construed to prohibit telephone users from attaching the Carterphone device to the facilities of the telephone companies for use in connection with interstate or foreign message toll telephone services, what action, if any, should be taken by the Commission with respect thereto.

IT IS FURTHER ORDERED, That Thomas F. Carter, Carter Electronics Corporation, the American Telephone

and Telegraph Co., the General Telephone Company of the Southwest, and the associated Bell System companies listed in the attached Appendix are hereby made parties respondent to this proceeding and a copy of this Order shall be served upon such party respondents;

IT IS FURTHER ORDERED, That any concurring, connecting and other participating carrier, listed as such in the aforesaid tariff, the United States Independent Telephone Association, the General Telephone and Electronics Service Corporation, the National Association of Railroad and Utilities Commissioners and any state regulatory body is HEREBY GRANTED leave to intervene upon the filing of a notice of intention to appear and participate in these proceedings within 30 days from the date of the publication of this Order in the Federal Register;

IT IS FURTHER ORDERED, That a hearing examiner SHALL BE DESIGNATED to preside in the proceedings ordered herein who shall prepare an initial decision on all of the issues as provided in Section 1.267 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Attachment
Released: October 21, 1966

APPENDIX F

Before the

Federal Communications Commission

Washington, D. C. 20554

FCC 66M-1569
92182

In the Matter of

Use of the Carterphone Device in Message Toll Telephone Service } DOCKET NO. 16942

ORDER

A prehearing conference having been held on November 17, 1966, at which certain agreements were reached and certain rulings were made;

IT IS ORDERED, This 17th day of November, 1966, that:

(1) The parties' direct cases on Issues 1, 2 and 3 may be presented either orally or, in whole or in part, in the form of sworn, written exhibits;

(2) On or before January 9, 1967, the parties shall exchange copies of their said exhibits, and shall also exchange a list of their witnesses to be presented orally together with a brief statement as to the scope of each witness's testimony;

(3) Any party wishing to call for cross-examination the sponsor of any other parties' exhibit shall give notification thereof on or before January 16, 1967;

(4) Hearing limited to the parties' direct, affirmative cases on Issues 1, 2 and 3 shall commence on January 23, 1967 at 10:00 a.m. in the offices of the Commission at Washington, D.C.[1]

CHESTER F. NAUMOWICZ, JR.
Hearing Examiner
Federal Communications
Commission

BEN F. WAPLE
Secretary

Released: November 21, 1966

[1] The specification of hearing site is, of course, subject to the action of the Chief Hearing Examiner on pleadings now pending before him.

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No. 772

In the

Supreme Court of the United States

OCTOBER TERM 1966

THOMAS F. CARTER AND CARTER ELECTRONICS CORPORATION,
Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
SOUTHWESTERN BELL TELEPHONE COMPANY
AND GENERAL TELEPHONE COMPANY
OF THE SOUTHWEST,
Respondents.

Reply of Respondent, General Telephone Company of the Southwest to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BURFORD, RYBURN & FORD,
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Attorneys for General Telephone Company of the Southwest, Respondents.

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No. 772

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THOMAS F. CARTER AND CARTER ELECTRONICS CORPORATION,
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SOUTHWESTERN BELL TELEPHONE COMPANY
AND GENERAL TELEPHONE COMPANY
OF THE SOUTHWEST,
Respondents.

Reply of Respondent, General Telephone Company of the Southwest to Petition for Writ of Certiorari to the United State Court of Appeals for the Fifth Circuit

---

Respondent, General Telephone Company of the Southwest, prays that Petition for Writ of Certiorari be denied.

STATEMENT

Petitioners' Statement is substantially correct but is deficient in failing to set forth the tariff on file with the Federal

Communications Commission. The applicable provisions of that tariff are as follows:

TARIFF F.C.C. NO. 132

"AMERICAN TELEPHONE AND
TELEGRAPH COMPANY
LONG LINES DEPARTMENT

MESSAGE TOLL TELEPHONE SERVICE

B. GENERAL REGULATIONS (Cont'd)

7. *Unauthorized Attachments or Connections*

No equipment, apparatus, circuit or device not furnished by the Telephone Company shall be attached to or connected with the facilities furnished by the Telephone Company, whether physically, by induction or otherwise, except as provided in this Tariff. In case any such unauthorized attachment or connection is made, the Telephone Company shall have the right to remove or disconnect the same; or to suspend the service during the continuance of said attachment or connection; or to terminate the service.

24. *Miscellaneous Devices Provided by the Customer* (Filed in compliance with Federal Communications Commission order dated February 6, 1957, in Docket No. 9189)

The provisions of Paragraph 7. preceding shall not be construed or applied to bar a customer from using devices which serve his convenience in his use of the facilities of the Telephone Company in the service for which they are furnished under this tariff, provided any such device so used would not endanger the safety of Telephone Company employees or the public; damage, require change in or alteration of, or involve direct electrical connection to, the equipment or other

facilities of the Telephone Company; or interfere with the proper functioning of such equipment or facilities; or impair the operation of the telephone system or otherwise injure the public in its use of the Telephone Company's services.

Except as otherwise provided in this tariff, nothing herein shall be construed to permit the use of a recording device, or of a device to interconnect any line or channel of the Telephone Company with any other communication line or channel of the Company or of any other person." (R. 102)

REASONS FOR DENYING THE WRIT

At the heart of the present controversy is the Federal Communications Act (47 U.S.C. 151 et seq) and its impact on Petitioners, Respondents and their customers and prospective customers. Respondents are common carriers engaged in communications by wire and are subject to the act and regulations thereunder (47 U.S.C. 152-153).

The provisions of the Federal Communications Act were summarized in the opinion of the Court of Appeals as follows:

"The starting point is the Communication Act of 1934, 47 U.S.C.A. Sec. 151 et seq. The National communications policy is broadly stated 'to make available * * * to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges * * *', 47 U.S.C.A., Sec. 151. The execution of the statutory scheme is committed to the FCC. And this structure, with infinite detail, undertakes to subject communication utilities to refined and comprehensive regulation.

"To achieve these goals, the Communication Act grants a broad range of powers to the Federal Communications Commission. 47 U.S.C.A. Sec. 201-222. The Commission has the power to require a telephone company to furnish 'service upon reasonable request therefor,' and, where the Commission 'finds such action necessary or desirable in the public interest,' to require interconnection with other carriers at rates set by the Commission after opportunity for hearing. 47 U.S.C.A., Sec. 201(a). 'All charges, practices, classifications, and regulations' of telephone companies 'shall be just and reasonable;' 'unjust or unreasonable' charges are unlawful, 47 U.S.C.A. Sec. 201(b). The Commission has the power to prescribe such rules and regulations as are 'necessary in the public interest' to carry out the provisions of the Act. 47 U.S.C.A. Sec. 201(b). To this end, the Commission has promulgated 493 pages of regulations governing the common carrier services provided by telephone companies. 47 C.F.R., Parts 20-69. It is unlawful for a telephone company to discriminate in any 'unjust or unreasonable' manner in its 'charges, practices, classifications, regulations, facilities, or services.' 47 U.S.C.A., Sec. 202(a). Each telephone company is required to file with the Commission, and keep open for public inspection, tariffs setting forth its charges, classifications, regulations, and practices. 47 U.S.C.A., Sec. 203(a). Such tariffs must be followed until such time as they are amended in the manner provided by the statute. 47 U.S.C.A., Sec. 203(b). A telephone company may not deviate from the rates, classifications, regulations or practices contained in the tariffs so filed. 47 U.S.C.A., Sec. 203(c).

"The FCC has the power and duty to examine all tariffs filed and may either on complaint or on its own initiative determine and prescribe what charges, classifications, regulations, and practices are 'just, fair, and reasonable' and are to be thereafter followed by the telephone company in question. 47 U.S.C.A., Sec. 205(a). The Commission is given extensive power to assess the value of

> the facilities of telephone companies. 47 U.S.C.A., Sec. 213. The Commission has the power to order a telephone company to provide additional facilities for the performance of its duties as a public utility, if such addition is 'in the interest of public convenience and necessity' or 'the expense involved therein will not impair the ability of the carrier to perform its duty to the public.' 47 U.S.C.A., Sec. 214(d). However, a carrier does not have the right to extend its lines unless the Commission authorizes it to do so by the issuance of a certificate of public convenience and necessity. 47 U.S.C.A., Sec. 214(a). The Commission has power to examine transactions entered into by any common carrier which may affect the carrier's charges or services. 47 U.S.C.A., Sec. 215(a). The Commission has the specific duty to keep informed as to 'technical developments and improvements in wire and radio communication * * * to the end that the benefits of new inventions and developments may be made available to the people of the United States.' 47 U.S.C.A., Sec. 218." (365 F. 2d 486 at 494-495)

In addition, a telephone company may not provide service unless schedules or tariffs are filed covering such service. 47 U.S.C. 203(c).

The Court of Appeals concluded that the effect of the Act is that "* * * scarcely a single business act is free from continuous regulation or at least administrative governmental review * * * *" (365 F. 2d 486, at 495).

1. The *Per Se* Antitrust Violation Rule does not apply

The pervasive regulatory scheme of the Communications Act prohibits application of the rule concerned with *per se* violation of the antitrust laws.

Keogh v. Chicago & Northwestern Ry. Co., 260 U.S. 156 (1922);

Silver v. New York Stock Exchange, 373 U.S. 389 (1963).

> "What may substantially lessen competition in those areas where competition is the main reliance for regulation of the market cannot be automatically transplanted to areas in which active regulation is entrusted to an administrative agency; for reasons we have indicated above, what competition is and should be in such areas must be read in the light of the special considerations that have influenced Congress to make specific provision for the particular industry." *Federal Communications Commission v. RCA Communications, Inc.*, 346 U.S. 86, 98 (1952).

2.. There Are Issues to be Determined by FCC

There are issues to be determined by the Federal Communications Commission. These involve AT&T Tariff F.F.C. No. 132, Message Toll Telephone Service, promulgated pursuant to the Communications Act. The issues raised by Petitioners' complaint are validity of the tariff and construction of the tariff, i.e. whether the tariff applied to prohibit use of the Carterfone (R86-87). Respondents' Motions to Dismiss also raise issues as to effect of the tariff on conduct of the telephone companies and liability for acts pursuant to the tariff. Each of these issues, and especially those of construction and validity, are to be determined by the Commission, at least in the first instance, under the doctrine of primary jurisdiction.

Primary jurisdiction is applied when a claim cognizable in the courts requires resolution of issues which, under a regu-

latory scheme, have been placed within the special competence of an administrative body.

United States v. Western Pacific R. Co., 352 U.S. 59 (1956).

The doctrine is also applied in order that the administrative body may perform its statutory obligation to see that rates and practices are equal and uniform.

Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1906);

United States v. Radio Corp. of America, 358 U.S. 334 (1959).

A third reason for applying the doctrine of primary jurisdiction is to utilize the agency's expert knowledge of and familiarity with the problems of the industry.

Far East Conference v. United States, 342 U.S. 570 (1951).

The issues in this case of validity or construction of the tariff are within the jurisdiction of the Federal Communications Commission. Petitioners seek to belittle this fact since the tariff involves service, practices and regulations rather than rates; this is a difference without legal effect since the Commission's power includes "* * * charges, practices, classifications and regulations for and in connection with such communication service * * *".

Ambassador, Inc. v. United States, 325 U.S. 317 (1944).

All of the reasons assigned for applying the doctrine of primary jurisdiction are here present. Construction and

validity of the tariff involve matters within the special competence and jurisdiction of the Commission. Likewise, court action in this or similar cases may well cause deviations from uniform application of the tariffs contrary to statutory mandate.

Petitioners contended below that the Carterfone did not actually connect with the telephone system although they would concede that the Carterfone does carry messages in connection with telephone company equipment. Thus, it appears that technical questions will arise as to what constitutes an interconnection. Likewise, technical questions may arise as to whether the Carterfone is suitable for use with telephone company equipment or if it may cause service problems. Other complex technical questions may arise. For example, see *Peters Sunset Beach Inc. v. Northwestern Bell Telephone Co.*, Minn. Railroad & Warehouse Comm. 1965, 60 PUR 3rd 363 (R. 118 et seq). The existence of such technical problems is an additional reason for applying primary jurisdiction.

Thus, construction of the tariff requires application of primary jurisdiction:

United States v. Western Pacific Railroad Co., 352 U.S. 59 (1956);

Louisville & Nashville Railroad Co. v. Knox Homes Corp., CA 5 (1965), 343 F. 2d 887.

Validity of the tariff is likewise for the Commission:

U. S. Navigation Co. v. Cunard Steamship Co., 284 U.S. 474 (1931);

Far East Conference v. United States, 342 U.S. 570 (1951);

Pan American World Airways v. United States, 371 U.S. 296 (1963).

The cases cited by Petitioners at pages 8-12 of their Petition for Writ of Certiorari are not contrary to the foregoing. In *United States v. Radio Corporation of America*, 358 U.S. 334 (1959), the power of the Federal Communication Commission over television stations was contrasted to the public utility regulation of telephone companies as this court said:

> "Thus, there being no pervasive regulatory scheme, and no rate structures to throw out of balance, sporadic action by federal courts can work no mischief. The justification for primary jurisdiction accordingly disappears."

In *Silver v. New York Stock Exchange*, 373 U.S. 389 (1963), there was no occasion to apply the doctrine of primary jurisdiction since the agency involved, Securities & Exchange Commission, had *no jurisdiction* to determine the matter involved. *California v. Federal Power Commission*, 369 U.S. 482 (1962) and *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963) involved proposed mergers; in both these cases, as well as *United States v. Radio Corporation of America*, supra, involving exchange of television stations, administrative action on the merger or exchange had been completed before this court reached its decision. There was no need, then, to apply the doctrine of primary jurisdiction.

> "We note, finally, that the doctrine of 'primary jurisdiction' is not applicable here. That doctrine requires judicial abstention in cases where protection of the in-

> tegrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme * * * Court jurisdiction is not thereby ousted, but only postponed * * *. Thus, even if we were to assume the applicability of the doctrine to merger-application proceedings before the banking agencies, the present action would not be barred, for the agency proceeding was completed before the antitrust action was commenced." (Citations omitted.) *United States v. Philadelphia National Bank*, supra.

3. Antitrust v. Administrative Standards

Petitioners' primary argument is that the doctrine of primary jurisdiction does not apply since any decision by FCC is for administrative purposes only and not for antitrust purposes. This argument is contrary to the decisions of this and other federal courts in regard to the effect to be given a pervasive regulatory scheme. In *Keogh v. Chicago & N.W. R. Co.*, 260 U.S. 156 (1922), this court said:

> "Section 7 of the Anti-trust Act gives a right of action to one who has been 'injured in his business or property'. Injury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights, as defined by the tariff, cannot be varied or enlarged by either contract or tort of the carrier."

See also: *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963);

SSW, Inc. v. Air Transport Assn. of America, CADC (1951), 191 F. 2d 658, cert. den. 343 U.S. 955;

Pennsylvania Water & Power Co. v. F.P.C., CADC (1951), 193 F. 2d 230, affirmed 343 U.S. 414.

Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1944), cited by Petitioners, was an original suit where Georgia alleged a conspiracy in violation of the antitrust laws to fix rail rates although the rates were approved by the I.C.C. This court there said:

> "We think it is clear from the Keogh Case alone that Georgia may not recover damages even if the conspiracy alleged were shown to exist. That was a suit for damages under Section 7 of the Sherman Act (July 2, 1890) 26 Stat. 209, 210, c.647. The Court recognized that although the rates fixed had been found reasonable and nondiscriminatory by the Commission, the United States was not barred from enforcing the remedies of the Sherman Act. 260 U.S. pp. 161, 162, 67 L. Ed. 187, 43 S. Ct. 47. It held, however, that for purposes of a suit for damages, a rate was not necessarily illegal because it was the result of a conspiracy in restraint of trade. The legal rights of a shipper against a carrier in respect to a rate are to be measured by the published tariff. That rate until suspended or set aside was for all purposes the legal rate as between shipper and carrier and may not be varied or enlarged whether by the contract or tort of the carrier. And it added: 'This stringent rule prevails, because otherwise the paramount purpose of Congress -prevention of unjust discrimination- might be defeated. If a shipper could recover under Sec. 7 of the Anti-trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors.' 260 U.S. p. 163. The reasoning and precedent of that case apply with full force here."

In recognition of these principles, the Court of Appeals held that "* * * a tariff, required by law to be filed, is not a mere contract. It is the law * * *" (265 F. 2d 486, 496). This is not an argument that Respondents are or are not im-

mune from the antitrust laws, nor that the F.C.C. has or does not have authority to immunize Respondents from antitrust liability. This is but giving effect to the statutory scheme and national policies represented by the Communications Act.

Likewise, it is the Communications Act and regulation thereunder that require application of primary jurisdiction to determine the issues raised by Petitioners' complaint.

The validity of a tariff established under a regulatory statute, when attacked in an antitrust suit, is to be determined by the agency involved under the doctrine of primary jurisdiction:

U. S. Navigation Co. v. Cunard Steamship Co., 284 U.S. 474 (1931);

Far East Conference v. United States, 342 U.S. 570 (1951);

Pan American World Airways v. United States, 371 U.S. 296 (1963);

Interstate Natural Gas Co. v. Southern California Gas Co., CA 9 (1953) 209 F. 2d 380.

Petitioners' argument of antitrust standards as opposed to administrative standards ignores the Communications Act, the powers of the Commission thereunder, and the responsibilities and obligations imposed on Respondents thereby.

CONCLUSION

This cause involves an important question of federal law involving possible conflict between the antitrust laws and the laws governing an administrative agency. This question has, however, been decided by this court on several occasions by evolution of the rule of primary jurisdiction. The decisions of the trial court and of the Court of Appeals in this cause are in accordance with the decisions of this court applying primary jurisdiction and in accordance with the reasons given for applying such rule. There are no decisions in conflict with the holding of the Court of Appeals.

For the foregoing reasons, Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copy of the foregoing brief has been this day served on Counsel of Record for Petitioners and Counsel for Other Respondents by depositing the same in the United States mail, first class postage prepaid, addressed to such counsel at their post office addresses.

December 13, 1966

Lynell C. Ridgeway III

Attorney for Respondent,
General Telephone Company
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No. 772

In the

Supreme Court of the United States

October Term 1966

THOMAS F. CARTER AND CARTER ELECTRONICS CORPORATION,
Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
SOUTHWESTERN BELL TELEPHONE COMPANY AND
GENERAL TELEPHONE COMPANY OF THE SOUTHWEST,
Respondents.

REPLY MEMORANDUM FOR PETITIONERS

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY

Respondent A T & T's contention that the instant cause merely concerns a "discretionary" denial of a preliminary injunction is not correct for the following reasons:

(a) The Trial Court denied a *hearing* on the Motion for Preliminary injunction (R. 161-162) and, unless the Court's Order of February 8 (R. 148-156) referring the damage cause is both correct and controlling, this action constitutes an abuse of discretion as a matter of law.

See, *e.g.*, *Hawkins v. Board of Control*, 253 F. 2d 752 (5th Cir. 1958) at 753:

> "Rule 65(b), F.R.C.P., 28 U.S.C.A., requires that a motion for a preliminary injunction 'shall be set * * * for hearing * * *.' Hearing requires a trial of an issue of fact. Trial of an issue of fact necessitates an opportunity to present evidence. Sims v. Greene, 3 Cir. 161 F. 2d 87. Since appellant was not given the opportunity to present evidence in his behalf, the order denying the preliminary injunction must be set aside."*;

(b) In denying preliminary injunctions, Rule 52(a) provides the trial court "*shall* * * * set forth findings of facts and conclusions of law * * *" Here the trial court expressly predicated its denial of a preliminary injunction on its order of February 8 which referred the damage cause. The appeal from the denial of the preliminary injunction thus necessarily brings forth the merits of such order. (Since no hearing was held on the injunction and the February 8 order was heard only upon legal arguments pertaining to Respondents Motions to Dismiss, all *fact* issues should be resolved in Petitioner's favor.);

(c) The Court of Appeals' opinion below was based squarely upon the legal issue concerning primary jurisdiction and not upon any discretionary injunction concept.

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* Rule 65(a)(2) as amended in 1966 provides in part: "Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be *advanced* and consolidated with the hearing of the application." (Emphasis added.) Here, under the doctrine of primary jurisdiction the trial on the merits was ordered *delayed* until after agency determination—a probable delay of several *years*. See Petition for Certiorari, p. 15.

The central question in this case is whether the trial court correctly invoked the doctrine of primary jurisdiction. In all cases involving primary jurisdiction (and not exclusive jurisdiction), the trial court will retain jurisdiction, and not dismiss, pending the administrative referral. Here, Petitioners not only appealed under the preliminary injunction provision, 28 U.S.C. §1292(a), R. 167, but also under the collateral order doctrine gave notice of appeal from the February 8 order, R. 169; and sought (unsuccessfully) a discretionary appeal from the trial court under §1292(b), R. 163-164, 166. In addition, they filed a Petition for Mandamus in the Court of Appeals.

If this case does not squarely raise the primary jurisdiction issue, there is no way to raise it in time for *effective* review.

By analogy, Congress, where the government is a party, favors Supreme Court review of antitrust and communication cases by providing a direct appeal from the trial court to this Court. 15 U.S.C. §29; 49 U.S.C. §45. *If the Respondent's arguments were correct, no such appeal would lie in primary jurisdiction cases.*

A T & T's Opposition to Certiorari is predicated upon the unsound premise of discretionary denial of an injunction; A T & T advances no valid reasons for denial of Certiorari as to the primary jurisdiction issue that is presented by the case at bar. Perhaps it should be emphasized that the case at bar involves economic competitive coercion within the competency of the courts and not problems of administrative expertise. In essence, the problem here would be the same

if various power companies combined to cut off the electricity of any consumer who did not use their brand of electric stoves. In the case at bar, the Respondents did not choose to meet competition by better services and lower charges; they chose instead to crush their competitor. Having done so, the Respondents now wish to place their actions under the protective mantle of primary jurisdiction. If they are able to sustain that position, then, even though the Petitioners should prevail in the F.C.C., the Respondents would have effectively prevailed in the antitrust suit because of the delay and because the agency hearing will not resolve any decisive issues to the antitrust suit.

Whether primary jurisdiction should be automatically invoked in antitrust suits involving regulated industries is a matter of sufficient national importance to be heard by this Court.

Respectfully submitted,

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